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In the
Supreme Court of the United States

October Term, 1985

DRAVO BASIC MATERIALS COMPANY,
LOUISIANA MATERIALS COMPANY, INC.,
PONTCHARTRAIN MATERIALS CORPORATION,
Intervenors and Petitioners,

v.

STATE OF LOUISIANA, EX REL WILLIAM
J. GUSTE, JR., ATTORNEY GENERAL, ET AL,
Plaintiffs and Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

This petition for certiorari presents a single question for resolution by this Court: the proper standard of judicial review of certain federal agency decisions taken pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. §4321, *et seq* (hereinafter sometimes "NEPA"). Specifically, the United States Army Corps of Engineers granted shell dredging permits to each of the petitioners herein, without preparing environmental impact statements (hereinafter sometimes "EIS"), on the basis of findings of no significant impact contained in environmental assessments.[1] That decision was challenged by the plaintiffs below. The issue presented here is whether the plaintiffs must merely show that the agency's decision was "unreasonable" and that the quality of the human environment "may be" degraded significantly by the proposed activity, as held by the Fifth Circuit, or whether they must

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[1]The parties to this proceeding include the petitioners, all of whom intervened as defendants in the prodeedings below: (1) Dravo Basic Materials Company, successor to Radcliff Materials, Inc., and a wholly owned subsidiary of Dravo Natural Resources Company, which in turn is a wholly owned subsidiary of The Dravo Corporation; (2) Pontchartrain Materials Corporation, a wholly owned subsidiary of Pontchartrain Dredging Corporation; and (3) Louisiana Materials Company, Inc., whose parent company is American Marine Holding Company (hereinafter collectively referred to as the "Companies"). Other parties include the plaintiffs below: (1) the State of Louisana ex rel William J. Guste, Jr. Attorney General; (2) Save Our Coast, Inc.; (3) The Orleans Audubon Society; (4) Sierra Club; (5) Manchac Fisherman's Association; (6) Environmental Defense Fund; and the original defendants below: (1) Colonel Robert C. Lee, District Engineer, New Orleans District, U.S. Army Corps of Engineers; (2) Lieutenant General Joseph K. Bratton, Chief of Engineers, Department of the Army; (3) William R. Gianelli, Assistant Secretary (Civil Works), Department of the Army, and (4) John O. Marsh, Jr., Secretary, Department of the Army (the original defendants below will be referred to collectively as the "federal defendants").

demonstrate in accordance with principles of administrative law that the agency's decision was "arbitrary and capricious." The circuit courts of appeals are seriously divided on this important question, which ought to be resolved by this Court.

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PETITION FOR A WRIT OF
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REPORTS OF THE
OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (hereinafter "the Fifth Circuit") was reported at 758 F.2d 1081 (5th Cir. 1985). Appendix A. The opinion of the United States District Court for the Eastern District of Louisiana was reported at 596 F. Supp. 645 (E.D. La. 1984). Appendix D.

JURISDICTION

The judgment of the Fifth Circuit was entered on April 29, 1985. Appendix A. A timely petition for rehearing was denied on June 5, 1985. Appendix B. A thirty day extension of time within with to file a petition for writ of certiorari was granted by this Court on September 3, 1985. Appendix C. This petition for certiorari was filed within that thirty day extension. This Court's jurisdiction is invoked under 62 Stat. 928, 28 U.S.C. §1254(1).

STATUTE AND REGULATION INVOLVED

This case turns primarily on the National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. §§4321, 4331 and 4332, and on the regulations promulgated thereunder, particularly 40 C.F.R. §1501.4 (1979). The pertinent statute and regulations are attached hereto as Appendix E.

STATEMENT OF THE CASE

The facts pertinent to this petition are straightforward and have not been contested in the courts below. Petitioners are all shell producers dredging clam and oyster shell deposits from state-owned waterbottoms in Louisiana pursuant to shell leases and other appropriate authorizations and permits issued by the state. Petitioners' activities also require federal permits issued by the United States Army Corps of Engineers pursuant to the Rivers and Harbors Act of 1899, 30 Stat. 1151, 33 U.S.C. §403, and the Clean Water Act, 86 Stat. 884, 33 U.S.C. §1344. Petitioners' federal permits were up for five year extensions in the latter part of 1982.

As part of its permit process, the Corps held public hearings and undertook the studies necessary to prepare environmental assessments pursuant to 42 U.S.C. §4332. The environmental assessments issued by the Corps contained "findings of no significant impact," which allowed the Corps to issue the requested permits to petitioner without preparation of formal environmental impact statements. The permits were in fact issued, and this litigation ensued.

The district court, which had jurisdiction over the matter pursuant to 28 U.S.C. §1331, properly framed the issue before it:

> Stated simply, the Plaintiffs assert that each [environmental assessment] does in fact reveal significant environmental impact and, as a matter of law, the relief sought [declaratory and injunctive relief ordering the Corps to prepare an EIS and enjoining shell dredging activities in the interim] is proper. Conversely, the Defendants assert that given the undisputed facts, the Corps' decision is a reasonable one.

State of Louisiana v. Lee, 596 F. Supp. at 652. The district court also properly noted that the burden was on the plaintiffs to demonstrate the necessity for an EIS, but that under applicable Fifth Circuit precedents "[t]he standard of judicial review is whether the agency decision not to develop an impact statement is reasonable and made objectively and made in good faith on a reviewable environmental record. If the decision is reasonable, the determinations must be upheld." *Id.*, citing *Save Our Wetlands, Inc. v. Sands*, 711 F.2d 634, 644, *reh. den.*, 718 F.2d 1096 (5th Cir. 1983). Based on the record before it, the district court concluded that the environmental assessments issued by the

Corps in 1982, and supplemented, modified and re-issued by the Corps in 1984 in conjunction with the litigation, were reasonable and should be upheld. *State of Louisiana v. Lee*, 596 F. Supp. at 657.

The Fifth Circuit vacated and remanded. It noted that the district court had properly stated the law of the Circuit that a plaintiff must show the agency decision to be unreasonable, but it disagreed with the district court's statement that an EIS is required if the environmental assessment reveals that the quality of the human environment *would be* significantly degraded. It held that the proper test requires a mere showing that the quality of the human environment *may be* significantly degraded by the proposed activity. *State of Louisiana v. Lee*, 758 F.2d at 1084. The Fifth Circuit decision has thus engrafted an additional element onto its reasonableness standard, and has effectively increased the split among the circuits by devising what amounts to a third standard that may aptly be dubbed "reasonableness plus." The lack of uniformity and the increasingly stringent test imposed by the Fifth Circuit will make it all the more difficult for a federal agency to authorize any major federal action without preparation of a full-blown EIS.

ARGUMENT

This case presents one straightforward issue that has been the subject of extensive litigation and inconsistent result at the circuit court level, and which has not yet been resolved by this Court: must a plaintiff challenging a federal agency decision to permit a major federal action to proceed without preparation of an EIS show that the agency was arbitrary and capricious in its decision, as required generally when courts review administrative decisions, or merely that it is reasonable to believe that the proposed

activity may have a signficant effect on the environment, as held by the Fifth Circuit?

In this case, the courts below applied the Fifth Circuit's reasonableness standard, which was first enunciated in *Save Our Ten Acres v. Kreger,* 472 F.2d 463 (5th Cir. 1973). In that case, plaintiff sought to enjoin construction of a federal office building, alleging that it would significantly affect the environment. The GSA had selected the site and commenced construction without preparing an EIS. The district court refused any relief, holding that GSA's determination that the project did not significantly affect the environment could not be disturbed unless the court concluded that the decision was arbitrary, capricious or an abuse of discretion. The Fifth Circuit reversed and remanded, invoking the reasonableness standard.

The Fifth Circuit reasoned in *Save Our Ten Acres* that "the spirit of the Act [NEPA] would die aborning if a facile, *ex parte* decision that the project was minor or did not significantly affect the environment were too well shielded from impartial review."[2] Accordingly, the court found that the threshold determination must be subject to a more "searching standard" under which a court must determine whether the plaintiff has alleged facts which, if true, would demonstrate that the project would not meet NEPA criteria. If so, a reviewing court should examine and weigh the evidence of both plaintiff and the agency to determine whether the decision was reasonable.[3] The court further held that this inquiry is not limited to consideration of the administrative record but must also encompass

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[2]*Save Our Ten Acres,* 472 F.2d at 466.

[3]*Id.* at 466-67.

other evidence, including supplemental affidavits and depositions, if it can be shown there was an inadequate evidentiary development before the agency.[4]

The Fifth Circuit based its decision in *Save Our Ten Acres* on two factors: the Congressional intent underlying NEPA, and "the solid support" of this Court's landmark decision in *Citizens to Preserve Overton Park, Inc. v. Volpe*.[5] It cited the language of Section 4332 of NEPA as evincing a Congressional intent favoring the preparation of an EIS in all close cases. That section directs that the environmental factors and effects of an agency action are to be considered to the fullest extent possible. Thus, it was suggested that an agency's threshold decision not to prepare an EIS precludes such consideration.

The court noted that while the Supreme Court "made it clear that the ultimate merit decision based upon a weighing of these environmental considerations should be reviewed under the arbitrary, capricious, or abuse of discretion standard, a thorough study of *Overton Park* teaches that a more penetrating inquiry is appropriate for court-testing . . . of whether all relevant factors should ever be considered by the agency."[6] This conclusion is based on *Overton Park's* formulation of a two-step test for review of a threshold decision. The initial determination is what range of choices are available to the secretary and whether the "decision can reasonably be said to be within that range." Then, the reviewing court must find that "the secretary could have reasonably believed" that there were no feasible alternatives. After this inquiry, the court stated

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[4] *Id.* at 467.

[5] 401 U.S. 402, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971), *on remand*, 335 F. Supp. 873, *supp. op.*, 357 F. Supp. 846 (W.D. Tenn. 1973).

[6] *Save Our Ten Acres*, 472 F. 2d at 466.

that the facts must be scrutinized to determine that the actual decision reached was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[7]

The *Save Our Ten Acres* court further declared that the threshold decision whether a proposed project is major and significantly affects the environment is a "basic jurisdiction-type conclusion"[8] to which the traditional role of review of administrative fact determination should not apply.[9]

The original reasonableness test of the Fifth Circuit has generally been followed by the Eighth,[10] Ninth,[11] and Tenth[12] Circuits. The "reasonableness plus" standard first enuciated by the Fifth Circuit in this action has apparently not yet been considered by any other circuit, although it has very recently been reiterated with approval by the Fifth Circuit.[13]

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[7]*Overton Park*, 91 S. Ct. at 823-24.

[8]*Save Our Ten Acres*, 472 F.2d at 466.

[9]In a later decision, the Fifth Circuit stated that its adoption of the reasonableness standard was made necessary by its concern for the spirit of NEPA, without reference to *Overton Park*. *Hiram Clarke Civic Club, Inc. v. Lynn*, 476 F.2d 421 (5th Cir. 1973).

[10]*Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314 (8th Cir. 1974).

[11]*City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975).

[12]*Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244 (10th Cir. 1973).

[13]*Citizen Advocates for Responsible Expansion, Inc. v. Dole*, 770 F.2d 423 (5th Cir. 1985).

By contrast, other circuits have held plaintiffs to the more rigorous requirement that they demonstrate that the agency decision on the EIS threshold determination was arbitrary and capricious before it will be upset. The leading case in this regard came out of the Second Circuit: *Hanly v. Kleindienst*, 471 F.2d 823 (2nd Cir. 1972), *cert. den.*, 412 U.S. 908, 36 L. Ed. 2d 974, 93 S. Ct. 2290 (1973) and later app. 484 F.2d 448 (2nd Cir. 1973), *cert. den., Hanly v. Saxbe*, 416 U.S. 936, 40 L. Ed. 2d 286, 94 S. Ct. 1934 (1974) (hereinafter *Hanly II*).

In *Hanly II*, the Second Circuit noted that the standard of review employed in evaluating such threshold determinations by an agency is a consequence of the characterization of the issues. Under the Administrative Procedure Act, factual and policy determinations by an agency are to be given considerable deference by the reviewing court, while constitutional and statutory questions are subject to *de novo* review. Thus, 5 U.S.C. §706 provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Accordingly, *Hanly II* considered whether an EIS threshold determination is a question of law or fact. The decision pointed out that "where the court's interpretation of statutory language requires some appraisal of facts, a neat delineation of the legal issues for the purpose of

substituted judicial analysis has sometimes proven to be impossible or, at least, inadvisable."[14] The court added that in this situation "the Supreme Court has authorized a simpler, more practical standard, the 'rational basis' test, whereby the agency's decision will be accepted where it has 'warrant in the record' and 'a reasonable basis in law.' "[15]

Notwithstanding the availability of the rational basis standard, the Second Circuit held that the arbitrary and capricious standard of the Administrative Procedure Act was clearly the appropriate one to apply in this situation. Since "the meaning of the term 'significantly' as used in §102(2)(c) of NEPA can be isolated as a question of law" appropriate for statutory interpretation by the court, the appraisal of the adverse environmental consequences of the project was viewed as a fact-sensitive inquiry by the agency which should not be overturned unless manifestly arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[16]

Unlike the Fifth Circuit, the Second Circuit found the arbitrary and capricious standard to be in accordance with this Court's decision in *Overton Park*, and saw "no reason for application of a different approach here since the APA standard permits effective judicial scrutiny of agency action and concommitantly [sic] permits the agencies to have some leeway in applying the law to factual contexts in which they possess expertise."[17]

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[14] *Hanly II*, 471 F.2d at 829.

[15] *Id.*, *citing NLRB v. Hearst Publications*, 322 U.S. 111, 131, 88 L. Ed. 1170, 64 S. Ct. 851 (1944) (emphasis added).

[16] *Id.* at 828-30, *citing* 5 U.S.C. §706 (2)(A)(1976).

[17] *Id.* at 829-30.

The Second Circuit in *Hanly II* noted that Congress could have mandated that every major federal action requires an EIS, but declined to do so. Instead, Congress prefaced its declaration with the word "significant." Accordingly, the court espoused two relevant factors that an agency must apply to each factual context:

> 1) [T]he extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and 2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area.[18]

The arbitrary and capricious standard of the Second Circuit has also been adopted by the Fourth[19] and Seventh[20] Circuits.

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[18] *Id.* at 830-31.

[19] *City of Alexandria, Virginia v. Federal Highway Administration*, 756 F.2d 1014 (4th Cir. 1985). The issue was most recently before this Court on a petition for certiorari to review a Fourth Circuit decision upholding once again the arbitrary and capricious standard. *Gee v. Boyd*, ___ U.S. ___ , 105 S. Ct. 2123, 85 L. Ed. 2d 487 (1985).

[20] *First National Bank of Chicago v. Richardson*, 484 F.2d 1369 (7th Cir. 1973). The Seventh Circuit has very recently reaffirmed its adherence to the arbitrary and capricious standard. *River Road Alliance, Inc. v. Corps of Engineers*, 764 F.2d 445 (7th Cir. 1985), *reh. den.*, ___ F.2d ___ (7th Cir. 8/8/85).

The other circuit courts of appeal have either not addressed the question clearly, or have not resolved it definitively. The District of Columbia Circuit has adopted a hybird test which attempts to incorporate elements of both the reasonableness standard and the arbitrary and capricious standard. *See Maryland- National Capital Park & Planning Commission v. United States Postal Service*, 487 F.2d 1029 (D.C. Cir. 1973). A result-oriented hybrid test may also be the direction in which the First Circuit is moving, as indicated by its very recent decision in *Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir. 1985).

One can certainly agree with the Fifth Circuit's view that NEPA represents a clear expression of Congressional concern for the environment, without accepting its corollary that settled principles of administrative law should therefore be set aside, that NEPA should be made to say what in fact it does not say, and that a certain and clear standard of judicial review should be replaced by an uncertain and ambiguous standard. The conflicting standards of judicial review of the critical threshold determination reduce the discretion and the deference accorded to the administrative agency (a result for which there is no indication of any Congressional intent in NEPA) and make the work of federal agencies in those circuits which have adopted the reasonableness standard that much more onerous and burdensome.

The confusion created by the decision below is magnified by the Fifth Circuit's holding that the plaintiff does not need to show that the quality of the human environment *would be* significantly degraded by the proposed activity, but merely that it *may be* significantly degraded. *State of Louisiana v. Lee*, 758 F.2d at 1084. It is hard to imagine any decision by any federal agency, or any type of commercial activity such as that engaged in by the Companies, which is not threatened by such a sweeping and at the same time ill-defined standard. As a result of the vagueness and uncertainty of the standard being applied by the Fifth Circuit, the Companies are facing the possible shutdown of their entire industry in the State of Louisiana, despite a finding of no significant impact on the environment by the Corps and the decision by the reviewing court that the Corps' determination was reasonable.

The issues framed by this petition are of substantial public significance and interest, as demonstrated by the

large number of very recent circuit court decisions addressing the issue.[21] Unfortunately, the recent decisions have worked greater mischief than merely perpetuating the conflict that has existed among the circuits for more than a decade; they have also deepened the conflict and made the applicable standard of judicial review even more ambiguous and uncertain. A prime example of this regrettable trend is the Fifth Circuit's opinion in this case, which has established an ill-defined and difficult "reasonableness plus" standard that has no justification in NEPA or in settled principles of administrative law. These are issues of great importance and concern not only to private entities such as the petitioners, but also to the Corps and other federal agencies, and they are issues ripe for resolution by this Court.

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[21] *See* notes 13, 19 and 20 above, and accompanying text.

CONCLUSION

For the foregoing reasons, petitioners respectively submit that a writ of certiorari should issue, and that the judgment of the Fifth Circuit should be reviewed and, after due proceedings, reversed.

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October ___ , 1985

CERTIFICATE OF SERVICE

I certify that copies of the foregoing petition for writ of certiorari have been served by hand or United States Mail, postage prepaid, on counsel of record for respondents and all other parties.

New Orleans, Louisiana, October ____ , 1985.

_____

James A. Burton

APPENDIX A

STATE OF LOUISIANA, et al.,
Plaintiffs-Appellants,

v.

Colonel Robert C. LEE, et al.,
Defendants-Appellees.

No. 84-3699

United States Court of Appeals,
Fifth Circuit.

April 29, 1985.

Before CLARK, Chief Judge, GOLDBERG, and TATE, Circuit Judges.

CLARK, Chief Judge:

Plaintiffs appeal the district court's summary judgment dismissing their claim that the National Environmental Policy Act (NEPA) required the U.S. Army Corps of Engineers (Corps) to complete an environmental impact statement before renewing six permits for shell dredging in Louisiana waters. We vacate and remand.

I

In 1982 the Corps, pursuant to the Rivers and Harbors Act, 33 U.S.C. § 403, and the Clean Water Act, 33 U.S.C. § 1344, renewed six five-year permits allowing the holders to dredge for shells in the Louisiana Gulf Coast area, which consists of the Gulf of Mexico, East and West Cote Blanche, Four League Bay, and Vermilion Bay, as well as in Lake Pontchartrain and Lake Maurepas. Before issuing the renewals, the Corps performed the environ-

mental assessment mandated by the Council on Environmental Quality NEPA Regulations, 40 C.F.R. § 1508.9. After reviewing this assessment the Corps concluded that NEPA did not require preparation of an impact statement and instead issued a finding of no significant impact under 40 C.F.R. § 1508.13.

Plaintiffs, five private environmental groups[1] and the state of Louisiana, then filed this suit seeking (1) a declaratory judgment that the renewal of the permits without preparation of an impact statement violated NEPA and (2) an injunction requiring the Corps to rescind the permit extensions and to prohibit further dredging until an adequate impact statement is prepared. Four of the companies who had received the extensions, Radcliff Materials, Inc., Louisiana Materials Company, Inc., Pontchartrain Materials Corp., and Pontchartrain Dredging Corp., intervened as defendants pursuant to Fed.R.Civ.P. 24.

After plaintiffs moved for summary judgment, the Corps responded with a motion to suspend the court proceedings and remand the record for further consideration by the Corps. The court granted the Corps's motion, but allowed only about nine weeks for the reconsideration. At the end of this period the Corps filed a revised environmental assessment and findings of fact and again entered a finding of no significant impact. The Corps's simultaneous motion to remove the 1982 environmental documents from the record was denied.

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[1] Save Our Coast, Inc., The Orleans Audubon Society, Sierra Club, Manchac Fisherman's Association, and the Environmental Defense Fund.

Both parties then moved for summary judgment. The district court granted defendants' motion and dismissed plaintiffs' actions.

II

On appeal plaintiffs maintain that the district court's order was erroneous because defendants failed to establish that there was no material dispute as to whether the Corps was reasonable in concluding that no significant environmental impact would result from continuing the dredging. They also assert that the judge should not have considered the restrictive conditions imposed on the permits in reviewing the Corps's decision. Finally they ask us to order the district court to enter summary judgment in their favor and for an injunction against further dredging until the impact statement is completed.

A

NEPA requires the preparation of an impact statement whenever a major federal action significantly affecting the quality of the human environment is proposed. 42 U.S.C. § 4332(C). The district judge stated that the NEPA regulations prepared by the Council on Environmental Quality indicated that the Corps's decision on extending these permits constituted "major federal action." 596 F.Supp. 645, 651 n. 7 (E.D. La. 1984). At oral argument before the district court, the attorney representing the Corps stated that he was not asserting the decision did not represent major federal action. Therefore, the only question presented is whether continuation of the dredging will have a significant impact on the human environment.

1.

All parties agree that unrestricted dredging would have a significant environmental effect. 596 F.Supp. at 655. The defendants contend, however, that the restrictive conditions imposed on the dredging permits reduce the effect below the level of significance. Plaintiffs assert that these restrictions should not be considered in assessing the impact of the dredging and, in the alternative, even if they are considered the dredging will still have a significant effect on the human environment. For their first point they rely on an interpretive document issued by the Council on Environmental Quality, "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations." 46 Fed.Reg. 18,026 (1981). In this document the Council stated: "[m]itigation measures may be relied upon to make a finding of no significant impact only if they are imposed by statute or regulation or submitted by an applicant or agency as part of the original proposal." Id. at 18,038.

[1,2] The district court correctly concluded that plaintiffs' reliance on this document is misplaced. Although the NEPA regulations issued by the Council are binding on all federal agencies, this publication is not a regulation but merely an informal statement. Therefore, it is not a controlling authority. *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 682 (D.C.Cir.1982). Second, despite the Council's statement that this document did not impose any additional requirements beyond those contained in the NEPA regulations, 46 Fed.Reg. at 18,026, the underlying regulations cited by the Council, 40 C.F.R. §§ 1508.8 and 1508.27, do not discuss the propriety of considering mitigating conditions. 685 F.2d at 682-83. Finally, NEPA was intended to address reality, not a hypothetical situation. The conditions at issue are

embodied in the permits themselves. This is not an instance where the proposed mitigating conditions consist of vague statements of good intentions by third parties not within the control of the agency. In *Preservation Coalition, Inc. v. Pierce,* 667 F.2d 851, 860 (9th Cir.1981), the court properly concluded that such tenuous assurances could not be considered as mitigating the significance of the environmental effects. Rather, here the conditions are legally enforceable by the Corps. The dredging must be conducted in accordance with these restrictions. Therefore, the only realistic course of action is to consider the conditions in reviewing the Corps's decision not to file the impact statement.

2.

[3] Judicial review of an agency's decision not to file an environmental impact statement is governed by the rule of reasonableness. "The standard of judicial review is whether the agency decision not to develop an impact statement is reasonable and made objectively and made in good faith on a reviewable environmental record. 'If the decision is reasonable, the determination must be upheld.'" *Save Our Wetlands, Inc. v. Sands,* 711 F.2d 634, 644 (5th Cir. 1983) (quoting *Save the Bay, Inc. v. U.S. Corps of Engineers,* 610 F.2d 322, 325 (5th Cir.), *cert. denied,* 449 U.S. 900, 101 S. Ct. 269, 66 L. Ed. 2d 130 (1980); *e.g. Vieux Carre Property Owners, Residents & Associates v. Pierce,* 719 F.2d 1272, 1279 (5th Cir. 1983). Under this standard

> the court must determine whether the plaintiff has alleged facts which, if true, show that the recommended project would materially degrade any aspect of environmental quality.
>
> * * * * * *
>
> If the court concludes that no environmental factor

> would be significantly degraded by the project, [defendants'] determination not to file the impact statement should be upheld. On the other hand, if the court finds that the project *may* cause a significant degradation of some human environmental factor (even though other environmental factors are affected beneficially or not at all), the court should require the filing of an impact statement or grant [plaintiffs] such other equitable relief as it deems appropriate.

Save Our Ten Acres v. Kreger, 472 F.2d 463, 466-67 (5th Cir.1973) (emphasis added).

To facilitate NEPA's basic purpose, we utilize this more rigorous standard rather than the rule of arbitrary and capricious review that ordinarily governs agency actions. This ensures that the environmental effects of a proposal are considered "to the fullest extent possible." *Id.* at 466. An environmental impact statement is intended to detail the environmental and economic effects of any proposed federal action so that those not directly involved can understand and give meaningful consideration to and make appropriate comment on the factors involved. It also ensures that the decisionmaker gives serious weight to environmental factors in making discretionary choices. *Sierra Club v. Morton*, 510 F.2d 813, 819 (5th Cir. 1975). *See Sierra Club v. Sigler*, 695 F.2d 957, 964-65 (5th Cir. 1983). The private defendants argue that the environmental assessments prepared in this case were so exhaustive as to be the "functional equivalent" of an impact statement. This argument overlooks the fact that the procedural requirements of NEPA governing the filing of impact statements were not met. Any decision based on an environmental assessment alone is necessarily more speculative than one made after the preparation and full

consideration required by an impact statement. Therefore, when such a decision places a given proposal beyond the purview of NEPA, it must be inspected under the searching standard described above. *Save Our Ten Acres*, 472 F.2d at 465-66.

3.

[4] In the case before us, the district court correctly required the plaintiffs to demonstrate the necessity of an impact statement. *Save Our Wetlands*, 711 F.2d at 644. However, the district court also stated that an impact statement was to be required "if the [environmental assessment] reveals that the quality of human environment *would be* significantly degraded by the proposed action...." 596 F.Supp. at 651 (emphasis added). This language indicates that the district judge subjected plaintiffs to an improper evidentiary burden. The court appears to have required plaintiffs to prove a significant degradation of the environment actually would result before the Corps' conclusion could be deemed unreasonable. Such a standard would be unrealistic. Plaintiffs would have to prove an absolute without the benefit of the factual basis Congress intended to provide by an impact statement.

In defining its standard, the district court relied on the following statement from *Save Our Wetlands:* "The burden is on the plaintiff attacking the 'no impact statement' decision to show that the quality of the human environment would be significantly degraded by the project. 711 F.2d at 644 (citing *Save Our Ten Acres*, 472 F.2d at 466-67). The purpose of this sentence was to reflect the holding in *Save Our Ten Acres*. It would have been more accurate had it read "the quality of the human environment *may* be significantly degraded." *Wetlands* was not

intended as a change of the standard of review set forth in *Ten Acres*, which remains the controlling precedent on this question in our circuit. Under *Save Our Ten Acres*, plaintiffs must establish only that the Corps was unreasonable in concluding there was no reasonable possibility that the proposed action would significantly degrade any environmental factor.

Because the agency's decision that an impact statement is not required pretermits the fact-gathering process designed by Congress, its decision, not plaintiffs' contentions, must be reviewed to determine if it reasonably supports an absolute. Such a procedure is consistent with the regulation defining an agency's finding of no significant impact: "'Finding of no significant impact' means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), *will not* have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared." 40 C.F.R. § 1508.13 (emphasis added).

4.

Based on the record before us, we cannot say that the district court would have granted summary judgment to defendants under the correct standard. The following are some examples of the environmental effects discussed in the record. The dredging will affect over two million acres of ecologically fragile water and wetland. By its very nature the dredging process is environmentally disruptive. A barge equipped with an excavating cutter-head digs through the shell deposits in reefs typically buried under four to eight feet of sediment. The shells are recovered through hydraulic suction. Other matter collected with the shells is diluted with wash water and then discharged. As

the discharge settles, it creates an inorganic gel which spreads across the bottom and can suffocate benthic or bottom-dwelling life, such as vegetation or oysters. Nektonic life, (fish, crabs, or shrimp) can be affected if, as alleged, the water quality is lowered by the dredging or if it disrupts their food supply. The process also increases the turbidity of the water, thereby reducing the light available for photosynthesis. Furthermore, it can also interfere with the process of delta-building in the Atchafalaya River and with the health of living reefs and the formation of new reefs. The Corps has deemed the process sufficiently disruptive to prepare impact statements for dredging in Texas, Florida, and Alabama--each of which produces less shell than Louisiana.

The administrative record shows that plaintiffs introduced evidence that the restrictions in the permits are insufficient to render the environmental effects insignificant and the Corps introduced evidence to the contrary. The Corps correctly asserts that the mere existence of differing opinions does not make its decision erroneous. Nevertheless, the district court must review the evidence carefully to ensure that the Corps was reasonable in concluding that there is no possibility that the dredging *may* cause a significant degradation of some environmental factor.

The many differences between the 1982 and 1984 environmental assessments also raise questions. The 1984 document reaches conclusions opposite to many of those reached in the 1982 report. Every change tends to minimize the environmental significance of the continuation of the dredging. The record leaves the reasons for these changes unclear. Plaintiffs maintain that the conditions imposed by the 1984 permits are similar in many respects to those in

place in 1982 and even in the 1977 permits. The defendants did not respond to plaintiffs' assertion that the changes in the conditions were insufficient to warrant the changes made in the environmental assessment. We reach no conclusion as to the validity of the 1984 assessment, but remind the district court that, to some extent, the 1984 assessment is a "*post hoc* rationalization and thus must be viewed critically." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 91 S.Ct. 814, 826, 28 L.Ed.2d 136 (1971).

Defendants maintain that the only question is whether the continued dredging will affect the status quo as it exists after fifty years of dredging. Particularly with respect to the benthic life in Lake Pontchartrain, they assert that the damage to benthic life was completed in the 1950's and so the effects of further dredging cannot be considered significant.

The district court, relying on *Sierra Club v.Hassell,* 636 F.2d 1095, 1099 (5th Cir.1981), accepted this argument, at least for the purpose of determining that the Corps was reasonable in concluding that the effect of dredging on Lake Ponchartrain's benthic life was insignificant. 596 F.Supp. at 657. However, *Hassell* is inapposite. It presented the question of whether the environmental impact of rebuilding a bridge destroyed by a hurricane should be assessed by analyzing its impact in comparison with the environmental status when the old bridge was in place or with the status during the brief interim after the bridge was destroyed. Our decision that the comparison should be with the conditions existent when the old bridge was in place was premised on the conclusion that the reconstruction would only restore an environmental status quo that had existed for twenty-four years prior to the hurricane. 636 F.2d at 1099.

This logic is not applicable to the present case. The renewal of these permits will not maintain a status quo, but rather will continue a course of environmental disruption begun years ago. The fact that much damage to the benthic life occurred years ago does not automatically render the effect of the continued dredging insignificant. Such a conclusion would ignore the realities that even a badly damaged body of water may restore itself to ecological health if a disruptive activity is halted and that continued dredging may expand the areas of damage. In deciding this case on remand, the trial court should compare the projected ecological status of the affected areas if the dredging is continued for another five years with their projected condition if the dredging is halted now.

The order granting summary judgment is vacated. The case is remanded for consideration under the standard of *Save Our Ten Acres*.

B.

This decision makes it unnecessary to reach plaintiffs' arguments for the entry of summary judgment in their favor and for an injunction against further dredging until the impact statement is prepared. The first of these matters must await the district court's reconsideration of its original decision and the second must be addressed to that court at an appropriate time.

III

Nothing said in this opinion is intended to intimate what decision the district court should reach as a result of applying the proper standard to the proof or whether that court may decide that further proof may be necessary. The

order of the district court is vacated and the cause is remanded for proceedings consistent with this opinion.

VACATED and REMANDED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 84-3699

STATE OF LOUISIANA, ET AL.,

Plaintiffs-Appellants,

versus

COLONEL ROBERT C. LEE, ET AL.,

Defendants-Appellees.

Appeal from the United States Court for the
Eastern District of Louisiana

ON PETITION FOR REHEARING

(June 5, 1985)

Before CLARK, Chief Judge, GOLDBERG and TATE,

Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby *Denied.*

ENTERED FOR THE COURT:

/s/ C. Clark

CHIEF JUDGE

APPENDIX C
SUPREME COURT OF THE UNITED STATES

No. A-175

DRAVO BASIC MATERIALS COMPANY, ET AL.,
Applicant

v.

LOUISIANA, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 3, 1985.

/s/ Byron R. White

Associate Justice of the Supreme Court of the United States

Dated this 3rd day of September, 1985.

APPENDIX D

STATE OF LOUISIANA, et al.

v.

COLONEL ROBERT C. LEE, et al.

Civ. A. No. 83-6126.

United States District Court,
E.D. Louisiana.

Sept. 14, 1984.

OPINION AND ORDER

McNAMARA, District Judge.

This litigation arises out of the five-year extension of six shell dredging permits issued by the U.S. Army Corps of Engineers (Corps) pursuant to the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, and the Clean Water Act, 33 U.S.C. § 1344. The permits allow four shell dredging companies to dredge in two areas of southern Louisiana. The "Gulf Coast Area", consists of the Gulf of Mexico, East and West Cote Blanche, Four League and Vermilion Bays. The "Lake Area", consists of Lakes Pontchartrain and Maurepas.

The Plaintiffs comprised of the State of Louisiana and several private environmentalist groups[1], allege that

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[1]The "private" Plaintiffs are Save Our Coast, Inc. The Orleans Audobon Society, Sierra Club, Manchac Fisherman's Association and the Environmental Defense Fund.

the Corps violated the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. §§ 701-706. Three of the shell dredging companies subject to the permits—Louisiana Materials Co., Inc., Radcliff Materials, Inc. and Pontchartrain Materials Corp.—have intervened as defendants. The Complaint seeks: (1) a declaratory judgment that the Corps' extension of the permits without first having prepared an environmental impact statement (EIS) constitutes a violation of the NEPA and (2) an injunction requiring the Defendants to rescind the permit extensions and to prohibit any shell dredging in the affected areas until an adequate EIS is prepared.

Presently before the court are the following Motions:

(1) The Motion of Federal Defendants to Limit Review to Evidence Contained within the Administrative Record;

(2) The Motion of Defendants Col. Robert C. Lee, Lt Gen.Joseph K. Bratton, William R. Gianelli and John O. Marshal, Jr. (collectively referred to as the Federal Defendants) to Dismiss the State of Louisiana as a Plaintiff;

(3) The Motion of Defendants-In-Intervention, Radcliff Materials, Inc., Pontchartrain Materials Corp. and Louisiana Materials Co., Inc. to Dismiss the State of Louisiana as a Plaintiff and to Dismiss the Complaint for Failure to Join an Indispensable Party Under Federal Rule of Civil Procedure 19; and

(4) Cross Motions of all parties for Summary Judgment.

On August 29, 1984, the parties presented oral argument in support of the above Motions and were advised that the matter would be taken under advisement. Having

considered the applicable law and arguments of counsel, the court enters its findings below.

I. MOTION TO LIMIT REVIEW TO ADMINISTRATIVE RECORD

In this Motion, the Federal Defendants seek to restrict the court's review to the documents that were before the Corps when the decision not to prepare an EIS was made.[2]

[1] All parties agree that the administrative record is indeed the "focal point" for determining the reasonableness of the Corps' action. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). The court will consider evidence beyond the administrative record only when it is alleged that the administrative record is in some manner deficient or inadequate. *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 467 (5th Cir.1973).

In oral argument, all parties agreed that the administrative record is in all manners complete and adequate. Although conceding the adequacy of the present administrative record, the Plaintiffs suggest that this case is not procedurally in the posture to dispose of on the summary judgment motion brought by Defendants. According to the Plaintiffs, discovery is necessary to determine the weight given by the Corps to a 1977 report authored by the

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[2]The only documents presented to the court in regard to environmental impact that are not in the administrative record are the affidavits of Stephen Steimle and Maureen Mulino attached to the Brief in Support of the Defendants-In-Intervention Motion for Summary Judgment.

Gulf South Research Institute at the direction of the shell dredging companies. This report was a condition precedent to a time extension permit in 1974.

[2] The court finds that further discovery is unnecessary because the administrative record does not indicate that the Corps merely "rubber-stamped" the GSRI report. *Save Our Wetlands, Inc. v. Sands*, 711 F.2d 634, 643 (5th Cir. 1983); *Cf. Sierra Club v. Sigler*, 695 F.2d 957, 962 n. 3 (5th Cir. 1983). To the contrary,the administrative record reflects that the Corps made an objective independent assessment of the studies it accumulated, of which the GSRI report was one of many.[3] Thus, there is no procedural bar to a final adjudication. Accordingly, the Motion to Limit Review to the Administrative Record is GRANTED.

II. MOTION TO DISMISS THE STATE OF LOUISIANA AS PARTY PLAINTIFF.

This Motion, brought by both the Federal Defendants and the Defendants-In-Intervention, is based on several alternative premises. Due to a misconception by the Defendants of the nature of this action, all of the premises lack merit.

Parens Patriae Standing of Louisiana

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[3]The 1984 GCA EA references 14 independent reports, studies and articles dealing with the subject matter, 6 reports drafted by the Corps concerning dredging in other tidal bay areas, and a Final Environmental Impact Statement prepared by the Louisiana Department of Natural Resources. The 1984 LA EA references over 70 independent reports and studies. Public hearings were conducted in regard to the continuation of dredging in both areas.

[3,4] Both the Federal Defendants and the Defendants-In-Intervention assert that the State of Louisiana is without *parens patriae* standing. Generally, it is true that a state cannot sue the Federal Government in a *parens patriae* capacity. *Massachusetts v. Mellon*, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923). The rule of *Mellon* is limited, however, to the factual circumstance of a state challenging the constitutionality of a federal statute. When the state *relies* upon the validity of a federal statute to assert a violation of it by an administrative agency charged with its enforcement, a state has *parens patriae* standing. *State of Alabama v. Tennessee Valley Authority*, 467 F. Supp. 791, 794 (N.D.Ala.1979), *aff'd. in pertinent part*, 636 F.2d 1061 (5th Cir.) *cert. denied*, 454 U.S. 837, 102 S.Ct. 142, 70 L.Ed.2d 118 (1981); *Washington Utilities & Transportation Commission v. F.C.C.*, 513 F.2d 1142, 1153 & n. 16 (9th Cir.1975), *cert. denied*, 423 U.S. 836, 96 S.Ct. 62, 46 L.Ed.2d 54 (1975).

[5] The exception to the rule of *Mellon* applies to this case; the State of Louisiana in fact relies on the NEPA in an effort to avail itself of the NEPA's protection. Furthermore, it is apparent that the requisite quasi-sovereign interests[4] of Louisiana are implicated in this litigation. *Louisiana v. Texas*, 176 U.S. 1, 19, 20 S.Ct. 251, 257, 44 L.Ed. 347 (1900); *State of Alabama*, 467 F.Supp. at 794. Accordingly, the court finds that the State of Louisiana has *parens patriae* standing.

Equitable Estoppel

In advancing this argument, the Defendants-In-Intervention contend that it is inconsistent for the State of

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[4]In this litigation, the State of Louisiana seeks to vindicate the rights of its citizens at large as well as the state's proprietary interests.

Louisiana to appear as a plaintiff in this litigation when state agencies have already, pursuant to state law, let water-bottoms and issued coastal use permits to the shell dredging companies.[5] The State of Louisiana counters with an argument that the compliance of the shell dredging companies with state law is irrelevant to an alleged violation of the NEPA.

[6] The court finds the rejoinder persuasive. The fact that the dredging companies complied with state law by attaining the approval of various state agencies in acquiring leases and permits, and, assuming that the Attorney General did not comment upon the effects of dredging prior to the issuance of the "state" permits, is of no moment to the alleged violation of the procedural requirements of the NEPA, that is, the failure to file an EIS. The course of conduct presently pursued by the State of Louisiana—requiring the Corps to prepare an EIS—is not necessarily inconsistent with the approval of leases and permits pursuant to state law. Therefore the actions of the Department of Natural Resources (DNR) and the Wildlife and Fisheries Commission (WFC) cannot be construed to be an implied waiver by the State of Louisiana of any benefits it may have under the NEPA. As such the initial element of equitable estoppel—a representation by the plaintiff—is lacking. *See Zimeri v. Citizens & Southern International Bank of New Orleans*, 664 F.2d 952, 955 (5th Cir.1981). Nor can it be said that the State of Louisiana has engaged in a prolonged course of conduct that would induce a

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[5]The Wildlife and Fisheries Commission is authorized to let state water-bottoms for the purpose of dredging shell deposits. La.R.S. 56:441(A). The Louisiana Coastal Commission, a branch of the Department of Natural Resources, has authority over the extension of coastal use permits. La.R.S. 49:213.11. It is undisputed that the dredging companies attained the leases and permits required by state law.

"justifiable reliance" by the dredging companies that the State of Louisiana would not oppose the Corps' actions in this case. *Cf. Michigan Wisconsin Pipeline Co. v. Williams-McWilliams Co., 551 F.2d 945, 951 (5th Cir.1977).*

Authority of State of Louisiana and Attorney General to Bring Action

[7] The Defendants-In-Intervention also contend that the State of Louisiana and its Attorney General lack the authority to bring this action because it conflicts with the true public policy of Louisiana.

The Attorney General of Louisiana is empowered with broad authority to prosecute actions in the interest of the state. La. Const. Art. 4, § 8 (1974); *State v. Texas Co., 199 La. 846, 7 So.2d 161, 162 (1942); Moity v. Louisiana State Bar Association,* 414 F.Supp. 180, 181 n. 3 (E.D.La.), *aff'd.,* 537 F.2d 1141 (1976).

The shell dredging companies contend that the public policy of Louisiana is expressed in La.R.S. 56:441. This statute merely provides that the Wildlife and Fisheries Commission "may sell and grant to any person the right and privilege of taking shell deposits from any of the shell reefs" located in Louisiana and delineates the prerequisites to attaining such a right. *Id.*

On the other hand, Louisiana made positive expressions in regard to protecting the state's natural resources and environment. In particular, Article 9, § 1 of Louisiana's Constitution (1974) provides:

> "The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic

quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy.

In any event, the policy of permitting the shell dredging of state owned water-bottoms, whether or not it is in the public interest, *is not being* challenged. Again, it is the failure of the Corps to file an EIS to which the State of Louisiana objects. Thus, the court finds that neither the State of Louisiana, nor its Attorney General, are prohibited from bringing this action for want of authority.

III. MOTION TO DISMISS FOR FAILURE TO JOIN UNDER RULE 19

The argument made herein is closely related to one addressed immediately above. In this Motion, which is urged by the Defendants-In-Intervention, it is contended that the WFC and DNR must be joined as defendants because these agencies have an interest in the ability of the dredging companies to operate under the leases and coastal use permits issued by these agencies and a judgment adverse to the Defendants would prejudice this interest. The movers further contend that since the joinder of the WFC and DNR would result in the anomalous situation of the State of Louisiana, through the Attorney General, appearing as plaintiff and the state agencies appearing as defendants, the appropriate action would be to dismiss the State of Louisiana as a party plaintiff. The court declines to do

so.[6]

[8-10] Due to the nature of this action, the effect that a judgment may have on third parties is irrelevant. The rights embodied in the NEPA are "public", rather than "private". *Natural Resources Defense Council v. Berklund, 458 F.Supp. 925, 933 (D.D.C.1978), aff'd.* 609 F.2d 553 (D.C.Cir.1979). The constraints of Rule 19 apply only to adjudications of "private rights". *Id., citing National Licorice Co. v.*NLRB, 309 U.S. 350, 366-67, 60 S.Ct. 569, 578, 84 L.Ed. 799 (1940); *Kirkland v. New York State Dept. of Correctional Services,* 520 F.2d 420, 424 (2d Cir.1975), *cert. denied,* 429 U.S. 823, 97 S.Ct. 73, 50 L.Ed.2d 84 (1976). Thus, under the rule of *National Licorice,* the DWF and DNR are not considered necessary parties. *See also State of Delaware v. Bender,* 370 F.Supp. 1193, 1197 (D.Del.1974).

IV. MOTION FOR SUMMARY JUDGMENT

[11] The procedural scheme contemplated by the NEPA and the Council on Environmental Quality NEPA Regulations (CEQ NEPA) is a relatively simple one. Paraphrasing § 4332(2)(C) of the NEPA, all agencies of the Federal Government are required to include in every

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[6]Central to the mover's argument is the question of where exactly the interests of Louisiana lie. Although, as movers emphasize, the WFC derives revenues from the issuance of leases, the enabling legislation of both DNR and WFC proclaims, as a matter of public policy, that the natural resources and environment are primary considerations. *See* La.R.S. 49:213.2(5); La.R.S. 56:1. The court need not resolve whether the State of Louisiana's posture in this litigation is aligned with that of the true public interest, and indeed should refrain from doing so. That decision is primarily a political one and is within the discretion of the Attorney General.

recommendation or report on proposals for major Federal actions significantly affecting the quality of the human environment, a detailed statement on the environmental impact, or EIS, of the proposed action. Stated another way, an EIS is mandated only if the major Federal action [7] significantly affects the quality of human environment. *Save Our Ten Acres*, 472 F.2d at 465.

[12] The threshold determination of whether the effect of the proposed action is sufficiently "significant" is made by the preparation of an Environmental Assessment (EA). 40 CFR § 1508.9. If the agency determines upon examination of the EA that the proposed action would not have a significant effect on the human environment, a "finding of no significant impact" or FNSI, must be prepared. 40 CFR § 1508.13. Conversely, if the EA reveals that the quality of human environment would be significantly degraded by the proposed action, an EIS is required. *Save Our Wetlands*, 711 F.2d at 644. Factors to be considered in making the "significance" determination include both the context and the intensity of the proposed action. 40 CFR § 1508.27.[8] *See also Hanly v. Kleindienst*, 471 F.2d 823,

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[7]The CEQ NEPA regulations indicate that the Corps' action qualifies as "major". 40 CFR § 1508.18(4). The parties do not contend otherwise.

[8]That regulation provides:

"Significantly" as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible

830-31 (2nd Cir. 1972), *cert. denied*, 412 U.S. 908, 93 S.Ct. 2290, 36 L.Ed.2d 974 (1973).

The Plaintiff's Motion for Summary Judgment is premised on a contention that the undisputed facts—the EA(s)—do not support the FNSI, or the decision not to prepare an EIS. Stated simply, the Plaintiffs assert that each EA does in fact reveal significant environmental

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(footnote 8 continued)
officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State or local law or requirements imposed for the protection of the environment.

impact and, as a matter of law, the relief sought is proper. Conversely, the Defendants assert that given the undisputed facts, the Corps' decision is a reasonable one.

[13] The burden is upon the Plaintiffs to demonstrate the necessity for an EIS. *Save Our Wetlands*, 711 F.2d at 644. "The standard of judicial review is whether the agency decision not to develop an impact statement is reasonable and made objectively and made in good faith on a reviewable environmental record. If the decision is reasonable, the determinations must be upheld." *Id.; Vieux Carre Property Owners, Residents & Associates v. Pierce*, 719 F.2d 1272, 1279 (5th Cir.1983).

EFFECTS OF DREDGING AS REFLECTED IN ENVIRONMENTAL ASSESSMENTS[9]

Gulf Coast Area

The shells dredged in the Gulf Coast Area (GCA) are primarily oyster shells. Oyster shell deposits are found in reefs formed of millions of cubic yards of shell more or less cemented together. The shells are dredged by means of a barge with an excavating cutter-head that digs through the shell deposits. The shells are recovered by hydraulic suction. Reefs are typically buried under four to eight feet of

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[9]After a May 23, 1984 Status Conference, the court granted the Corps additional time within which to reconsider its decision not to prepare an EIS. The Corps' decision was originally based on EAs prepared in 1982. As a result of the reconsideration, a revised 1984 EA and Findings of Fact were generated for both areas. The court has previously denied a Motion brought by the Federal Defendants "To Remove the 1982 Environmental Documents from the Record and to Require Plaintiff to File an Amended Complaint." Thus, both the 1982 and 1984 EAs are relevant to the court's inquiry particularly in light of the Corps' continued adherence to its original decision.

sediment, and vary in thickness from one to eight feet. In a twenty-four hour period, the dredge barge covers about one hundred and forty linear feet. The physical result of the dredging on the sea bed is a series of shallow troughs and mounds.

The geography of the GCA includes open bays, marshes ranging from fresh water to brackish to saline and cypress-tupelogum swamps. Most notably, the GCA encompasses the Lower Atchafalaya Basin Floodway, described as a "regionally unique faunal habitat". Twenty-two different types of vegetation and marsh grasses are indigenous to the coastal area. Cypress-tupelogum swamps comprise large areas in the southeastern part of the Lower Atchafalaya Basin Floodway. Due to periodic flooding, these swamps are also an important part of the aquatic ecosystem, serving as a nursery area for sport and commercial fish. The swamps are home to nutria, mink, raccoon and are a breeding ground for wood ducks, heron and egrets.

Six different "impacts" associated with dredging are addressed in the GCA EAs: water quality (turbidity, contaminants, etc.), benthic organisms (oysters), nektonic organisms (fish, crabs and shrimp), the formation of the Atchafalaya Delta, the relationship between the trenches left by dredging and storm waters, and the impact caused by the dredging of exposed reefs.

Undoubtably, the most adverse impact attributable to dredging on the environment in the GCA would be the interruption of the delta-building process where the Atchafalaya River empties into the Gulf of Mexico:

Dredging in the developing Atchafalaya Bay Delta

> may seriously impact the formation of the delta mainly through loss of shallow water bottom and accelerated erosion. The Atchafalaya Bay Delta is projected to develop into more than 80 square miles of tidal wetlands. This new land development is a rare occurrence in coastal Louisiana, where marshas have been deteriorating at an average rate of 39 square miles a year. The delta is composed of approximately 16 square miles of vegetated islands, extensive shallow flats, and numerous interconnecting natural channels. Preliminary assessments from studies on Atchafalaya delta building indicate that dredging, and in particular shell dredging, apparently interferes with processes associated with the distribution of sediment within the delta complex.

1984 GCA EA at 11.

In light of the definite adverse impact on the Atchafalaya Delta, the 1984 GCA EA recommends that all shell dredging activities should be kept outside of the delta building area.

The Corps also found that dredging of exposed reefs affects the ecosystem of the tidal bays. Dredging these exposed reefs alters the natural water circulation patterns of the estuaries that are a nursery ground for "almost all of the economically important fish and shell fish." Besides providing an important habitat for both marine life and birds such as gulls and terns, the reefs act as barriers which protect adjacent shorelines and marshes from wave erosion. Furthermore, sports fishing would be significantly impacted if dredging were allowed in areas near exposed reefs and other areas heavily fished, namely in certain parts of Vermilion and Weeks Bay. As with the Atchafalaya Delta, it is concluded that restricting dredging

from the areas surrounding the exposed reefs and areas heavily utilized for sports fishing will greatly reduce the degree of impact.

The impact on water quality is generally considered minimal and of a temporary and short-lived nature. This same assessment holds true for nektonic organisms which, due to their mobility, can easily avoid dredging activities and feed elsewhere.

The Corps deemed the physical removal and/or burial of benthic organisms by dredging a significant impact on these organisms but that such impact would be limited to a small area in comparison to the vastness of the water bottoms involved. Any possibility of harm to live oyster beds can be alleviated by use of proper dredging techniques to assure that the turbidity plumes are carried away from the beds by currents, wind and gravity.

The Corps determined that the trenches left by dredging have no effect on directing storm surges toward the mainland.

Lakes Area

The shells dredged in the Lakes Area (LA) are primarily clam, or *rangia cuneata*. These fossil clam shells, unlike oyster shells, are not attached to one another in reef formations. The nature of the operation and equipment used in dredging this area is somewhat different than that used in the GCA, but the effect on the water-bottom is similar: a shallow trench about two feet deep and four to five feet wide. Lakes Pontchartrain and Maurepas are low salinity estuaries which together cover an area of approximately 723 square miles. The lakes are connected to one another

through Pass Manchac and North Pass; Lake Pontchartrain connects with the Gulf of Mexico through the Rigolets, Chef Menteur Pass, Lake Borgne, the Mississippi Sound and several manmade waterways.

The lakes are highly turbid and the beds are predominantly silty clay. Marsh ranging from freshwater to brackish, with cypress-tupelogum swamp and urban areas surrounded Lake Pontchartrain; freshwater marsh and cypress-tupelogum swamp surround Lake Maurepas.

Thirty-six types of vegetation, including various marsh grasses, bald cypress and drummond red maple are indigenous to the area. A 1976 study relied on by the Corps lists 82 types of vertebrate and invertebrate collected in the LA. Among these are various types of mussels, clams and oysters, five types of shrimp, and numerous types of both saltwater and freshwater fish. A 1962 study noted by the Corps states that only four organisms maintain large resident populations in the Lake Area: anchovy, brackish water clams, mud crab and calanoid copepod. Of the clams, *rangia cuneata* is the most abundant.

Migratory waterfowl, such as scaup, mallards and coots as well as other birds reside in the LA. The marsh and swamp areas are inhabited by racoon, oppossums, rabbit, nutria, muskrat, mink, white-tailed deer and squirrels.

The 1984 LA EA specifically addressed the impacts of shell dredging on benthic and nektonic organisms, vegetation, and water quality.

As in the coastal waters, the Corps found that the impact on nektonic organisms in the LA is not significant due to the ability of these organisms to avoid dredging activity. Since dredging is prohibited in Lake Pontchartrain

in areas shallow enough to support growth and Lake Maurepas is devoid of rooted submerged vegetation, the Corps found no impact on vegetation.

However, as in the GCA, the Corps discerned an adverse impact on the benthos of the LA attributable to dredging. The benthic organisms which are in the direct path of the dredge will be smothered by the discharge. In some instances, mud also flows outside the dredged cut. Nevertheless, the impact on the benthic community is not considered to be significant because the effects are temporary and short term. To a great extent, the finding of a less than significant effect on the benthos of the LA is grounded on the premise that the major adverse impact occurred 25-30 years ago.[10]

The impacts to the water quality of Lake Pontchartrain associated with turbidity created by dredging is also considered minimal. This conclusion is based on the size, depth, volume and tidal action of the water body. Due to the smaller dimensions, a naturally occurring imbalance of the carbon-nitrogen-phosphorous ratio, seasonally high temperatures, low flushing rate and fresher water, that above proposition does not hold true for Lake Maurepas. Due to a combination of these factors, there is a "potential for the occurrence of a stressful system-wide event" in Lake Maurepas.

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[10]It is appropriate to consider the *status quo* of the environment in the area affected. *Sierra Club v. Hassell*, 636 F.2d 1095, 1099 (5th Cir. 1981). The 1984 LA EA in the instant case summarizes various reports as concluding that the diversity of the benthic community that existed in Lake Pontchartrain in the 1930's (when dredging initially started) was lowered decades ago. A study noted by the Corps hypothesizes that the remaining benthos of Lake Pontchartrain is composed of only the "hardiest organisms of the original community."

For this reason, it is recommended in the LA EA that dredging in Lake Maurepas be discontinued until a monitoring program designed to detect the onset of potentially unacceptable situations and a method of greatly minimizing the turbidity plumes can be implemented.

The Corps concluded that the so-called "dead zones" discovered in Lake Pontchartrain and the contaminants found in them are unrelated to shell dredging.

The 1984 LA EA poses the question: "What would happen if shell dredging were discontinued"? It is deduced that "considering the influences attributed to shell dredging over the last 50 years, the discontinuation of shell dredging would surely lead to the establishment of some other benthic community." *Id.* at 20. The long-term impacts are summarized in this fashion:

> Due to modifications of sediments caused by the direct-ever [sic] passage of a shell dredge, it is unlikely that a total recovery was ever possible. Nonetheless, if shell dredging were discontinued altogether and enough time were allowed to elapse, a self-sustaining benthic community would arise and stable sediment profile could become established. Persuasive evidence exists to show that recurrent shell dredging in Lake Pontchartrain precludes that possibility. Instead, recurrent shell dredging has induced the establishment of and does perpetuate the existence of a benthic community that exhibits attributes that are in synchrony with shell dredging. The induced community (that exists today) evidences many of the attributes ascribed to communities that: 1) have been subjected to prolonged periods of stress; and 2) arise during early stages of succession.

Id. at 20-21.

SIGNIFICANCE OF THE EFFECTS

Col. Lee, the District Engineer and ranking officer for the New Orleans District of the Corps, concludes that for both areas, the effects of dredging are not significant, *given the conditions which are imposed on the dredging permits.* For instance, he finds in regard to the GCA:

> Although there are adverse impacts associated with shell dredging, the special conditions and other restrictions placed on the operations have reduced them to such extent that an environment [sic] impact statement is not required. No Federal resource agency indicated that the expected impacts are of enough significance to require preparation of an environmental impact statement.

GCA Revised Findings of Fact, p.7.

Similarly, in regard to the LA, Col. Lee concludes:

> While it is recognized that shell dredging does cause impacts, my finding, based in part on my staff's review of all available studies and literature, does not indicate the impacts are of enough significance to require preparation of an environmental impact statement. I find the impacts of the shell dredging operations under the conditions of the permits to be not significant.

LA Revised findings of Fact, pp. 7-8.

Both the Federal Defendants and the Defendants-In-Intervention reiterated in argument to the court that the effects of dredging, *sans* the conditions imposed in the permits, are significant. Nevertheless, the Defendants contend

that the conditions are such that the need for an EIS is obviated.

[14] The nature of judicial review is a limited one; the court cannot interject its opinion for that of the agency's. *Stryker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227, 100 S.Ct. 497, 499-500, 62 L.Ed.2d 433 (1980). It is undisputed that the effects of dredging are environmentally significant, when *not* tempered by the restrictions set out in the permits. As such, the legal issue presented by the determinations made by the Corps in the case at bar is whether the Corps can consider the conditions in making a "significance" determination.

The majority of courts facing the issue have allowed agencies to avoid the EIS requirement by modifying projects to bring them below the significance threshold. Glitzenstein, *Project Modification: Illegitimate Circumvention of the EIS Requirement or Desirable Means to Reduce Adverse Environmental Impacts?* 10 Ecology Law Quarterly 253, 256 (1982). *See also Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 682 (D.C.Cir.1982); *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 860 (9th Cir.1982); *Simmans v. Grant*, 370 F.Supp. 5, 21 (S.D.Tex.1974). *Contra: Citizens for Responsible Area Growth v. Adams*, 477 F.Supp. 994 (D.N.H.1979).[11] To date, the Fifth Circuit has yet to address the issue.

In disregarding the conditions imposed on the

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[11] In *Preservation Coalition*, the court held that "when [the mitigating modifications are] to be undertaken by third parties, their commitments, while they need not be contractual, must be more than mere vague statements of good intentions." 667 F.2d at 860 (citations omitted).

permits, the Plaintiffs rely on a statement published by the CEQ at 46 Fed. Reg. 18026 (1981) entitled "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations." The response to Question 40 suggests that "[m]itigation measures may be relied upon to make a finding of no significant impact only if they are imposed by statute or regulation, or submitted by an applicant or agency as part of the original proposal." *Id.* at 18038.

In *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678 (D.C.Cir.1982), the appellants also relied on the above cited publication. The court deemed such reliance misplaced for several reasons. Firstly, the publication is not a regulation but is merely an informal statement, and thus is not entitled to the deference usually afforded administrative regulations. *Id.* at 682. Secondly, the underlying regulations do not reflect that consideration of mitigation measures is inappropriate, although the publication states that it imposes no additional requirements beyond those in the NEPA regulations. Id. at 683.[12]

[15] Regardless of the weight to which the aforementioned publication is entitled to, this court is convinced that consideration of mitigating conditions is not inconsistent with the policies of the NEPA. "The policies of the NEPA partly rest on informing Congress and the public about potential environmental effects, as well as exploring alternatives to the action which might lead to less environmental impact." *Maryland-National Capital Park and*

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[12]The court in *Cabinet Mountains Wilderness* also noted that the publication could not be afforded retroactive effect to the facts of that case. 685 F.2d at 683. The instant case presents no retroactivity bar to consideration of the publication.

Planning Commission v. U.S. Postal Service, 487 F.2d 1029, 1041 (D.C.Cir.1973). The requirement of an EIS is designed to implement this policy by acting as a full disclosure of the environmental consequences of a proposed action, and by ensuring that an agency will integrate environmental concerns into its decision-making process at the earliest possible stages. Glitzenstein, *supra* at 264 (citations omitted).

The policy of disclosure and responsible environmental decision-making were given proper deference by the Corps in the case *sub judice*. The EAs reflect an objective and independent assessment of a comprehensive compilation of studies and articles dealing with the overall short-term and long-term environmental impacts of shell dredging.[13] There exists no valid reason to disregard the conditions imposed by the Corps. as well as those imposed by various state agencies.[14] To do so is to ignore the realities of the proposed actions and require an EIS because of the effects posed by a "hypothetical" project, rather than the effects of the actual proposal. *See also Simmans*, 370 F.Supp. at 18 (just as mitigation measures are required in an EIS, such measures should likewise be identified in an environmental impact appraisal). The procedural scheme of NEPA is not so inflexible that the actual effect of the proposal must take a back seat to the effects of an action to which in fact, the environment will not be subjected. *Cf. Committee for Auto Responsibility v Solomon*, 603 F.2d 992,1003 (D.C.Cir.1979).

Having decided that the Corps can properly consider the conditions imposed on the permits, the question of the

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[13]*See* note 3, *supra*.

[14]The Louisiana Department of Natural Resources and Wildlife and Fisheries Commission have imposed conditions on the permits and leases required by state law.

reasonableness *vel non* of the "no significant effect" decision remains.

As for the GCA, the conditions address, *inter alia*, the primary concern of the effect on the emerging Atchafalaya Delta. Dredging is prohibited in a well-defined area near the Atchafalaya River Delta and the Wax Lake Outlet Delta. Likewise, dredging is prohibited within 1,000 feet of exposed oyster reefs and within 1,500 feet of any shoreline, and in specific areas heavily fished by sportsmen.

The Corps found that benthic organisms near or in the path of the dredge will be adversely impacted. But considering, as the Corps did, the limited number of benthic organisms so affected in comparison to the vastness of the area involved, the court finds the Corps' ultimate conclusion a reasonable one. The CEQ NEPA guidelines indicate that in making the significance determination, it is proper, under certain circumstances, to consider a broad context in which the effect takes place. 40 C.F.R. § 1508.27(a). Many areas inhabited by benthos will be untouched by dredging. Moreover, there are no threatened or endangered species impacted by dredging activity.

The conditions imposed in the LA permits include, as mentioned *infra*, a complete prohibition of dredging in Lake Maurepas until a monitoring system program approved by the New Orleans District of the Corps is implemented to detect the onset of potentially unacceptable situations relative to turbidity. Dredging is also prohibited in certain areas of Lake Pontchartrain, including the eastern part which contains live oysters.

In regard to the impacts associated with turbidity on the benthos of Lake Pontchartrain, it is noted that the Corps' conclusion that the effects are short-term and of a temporary nature, standing alone, are not enough to reduce the effects below the significance threshold. *See* 40 C.F.R.

§ 1508.27(b)(7). However, the court nevertheless finds reasonable the Corps' conclusion that given the environmental status of Lake Pontchartrain, the effect on the present benthic community is insignificant. *Sierra Club v. Hassell*, 636 F.2d at 1099.

[16] Furthermore, the state agencies have placed onerous conditions on the dredging activities for both areas as well. The manner of dredging and the number of shell dredging barges are restricted, not to mention specific areas which are off-limits. The requirement of the installation of a tamper-proof Loran C continuous location recording system on the dredge barges also assures that dredging is only done in those areas not restricted in the permits. Since the possible significant effects of dredging are mitigated by the conditions imposed by the Corps and state agencies, the court finds that the Corps was not unreasonable in determining that preparation of an EIS is unnecessary.

CONCLUSION

IT IS ORDERED that:

(1) The Motion of Federal Defendants to Limit Review to Evidence Contained within the Administrative Record be and it is hereby GRANTED;

(2) The Motion of Federal Defendants and Defendants-In-Intervention to Dismiss the State of Louisiana and the Complaint (on all grounds) be and it is hereby DENIED;

(3) The Motion of Plaintiffs for Summary Judgment be and it is hereby DENIED; and

(4) The Motion of Federal Defendants and Defendants-In-Intervention for Summary Judgment be and it is hereby GRANTED.

APPENDIX E

§ 4321. Congressional decaration of purpose

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

Pub. L. 91-190, § 2, Jan. 1, 1970, 83 Stat. 852.

§ 4331. Congressional declaration of national environmental policy

Creation and maintenance of conditions under which man and nature can exist in productive harmony

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private

organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

Continuing responsibility of Federal Government to use all practicable means to improve and coordinate Federal plans, functions, programs, and resources

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

Responsibility of each person to contribute to preservation and enhancement of environment

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

Pub.L.91-190, Title I, § 101, Jan. 1, 1970, 83 Stat. 852.

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any

environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve

the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.[1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

Pub.L. 91-190, Title I, § 102, Jan. 1, 1970, 83 Stat. 853; Pub.L. 94-83, Aug. 9, 1975, 89 Stat. 424.

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[1] So in original.

§ 1501.4 Whether to prepare an environmental impact statement.

In determining whether to prepare an environment impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in § 1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (§ 1501.7), if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant impact (§ 1508.13), if the agency determines on the basis of the evironmental assessment not to prepare a statement.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in § 1506.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under § 1507.3, the agency shall make the finding of no significant impact available for public review (including State and areawide clearinghouse) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to § 1507.3, or

(ii) The nature of the proposed action is one without precedent.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No. 85-569

Supreme Court of the United States

OCTOBER TERM, 1985

DRAVO BASIC MATERIALS COMPANY,
LOUISIANA MATERIALS COMPANY, INC.
PONTCHARTRAIN MATERIALS CORPORATION,
Intervenors and Petitioners,

v.

STATE OF LOUISIANA, EX REL WILLIAM J. GUSTE, JR.,
ATTORNEY GENERAL, ET AL
Plaintiffs and Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May petitioners raise for the first time in this Court the issue whether the Court of Appeals for the Fifth Circuit erred in continuing to hold, as it has since 1973, that the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* (NEPA), requires an environmental impact statement (EIS) when applying a rule of reason or reasonableness standard the court finds that a major Federal action may significantly affect the quality of the human environment.

LIST OF PARTIES

The parties in this Court include the petitioners, all of whom intervened as defendants in the proceedings below: (1) Dravo Basic Materials Company, successor to Radcliffe Materials, Inc., and a wholly owned subsidiary of Dravo Natural Resources Company, which in turn is a wholly owned subsidiary of The Dravo Corporation; (2) Pontchartrain Materials Corporation, a wholly owned subsidiary of Pontchartrain Dredging Corporation; and (3) Louisiana Materials Company, Inc., whose parent company is American Marine Holding Company. Plaintiffs below, respondents here, include (1) the State of Louisiana ex rel William J. Guste, Jr., Attorney General; (2) Save Our Coast, Inc.; (3) Orleans Audubon Society; (4) Sierra Club; (5) Manchac Fisherman's Association; (6) Environmental Defense Fund.[1]

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[1] The United States Officials who were the original defendants in this case are (1) Colonel Robert C. Lee, District Engineer, New Orleans District, U.S. Army Corps of Engineers; (2) Lieutenant General Joseph K. Bratton, Chief of Engineers, Department of the Army; (3) William R. Gianelli, Assistant Secretary (Civil Works), Department of the Army, and (4) John O. Marsh, Jr., Secretary, Department of the Army.

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No. 85-569

Supreme Court of the United States

OCTOBER TERM, 1985

DRAVO BASIC MATERIALS COMPANY,
LOUISIANA MATERIALS COMPANY, INC.
PONTCHARTRAIN MATERIALS CORPORATION,
Intervenors and Petitioners,

v.

STATE OF LOUISIANA, EX REL WILLIAM J. GUSTE, JR.,
ATTORNEY GENERAL, ET AL
Plaintiffs and Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents respectfully request that this Court deny the petition for a writ of certiorari filed by Dravo Basic Materials Company, Louisiana Materials Company, Inc., and Pontchartrain Materials Corporation, Intervenors and Petitioners, seeking reviews of the judgment of the United States Court of Appeals for the Fifth Circuit in this case. The United States, whose officials were defendants in the courts below, did not join in the petition for writ of certiorari. The opinion below is reported as *State of Louisiana, et al v. Col. Robert C. Lee, et al*, 758 F.2d 1081 (5th Cir. 1985), rehear. den. ____F.2d ____(5th Cir. 1985).

STATUTE AND REGULATION INVOLVED

The case involves the National Environmental Policy Act, 83 Stat. 852, 42 U.S.C. § 4332, *et seq.*, and the

regulations promulgated thereunder, 40 C.F.R. Parts 1500-1508, particularly 40 C.F.R. § 1508.3.[2]

STATEMENT OF THE CASE

The State of Louisiana and five organizations concerned with environmental protection brought this action against officials of the Corps of Engineers alleging that the Corps failed to comply with NEPA in issuing renewal permits for the dredging of clam and oyster shells along the coast of Louisiana and in Lakes Pontchartrain and Maurepas. The shell dredging companies whose permits were affected intervened as defendants. Summary judgment was thereafter granted defendants by the District Court. The Court of Appeals for the Fifth Circuit reversed, holding that the District Judge had applied the wrong standard of review. The Fifth Circuit quoted its precedents to reiterate that " 'the standard of judicial review is whether the agency decision not to develop an environmental impact statement is reasonable and made objectively and made in good faith on a renewable environmental record. 'If the decision is reasonable, the determination must be upheld.' " (*State of Louisiana, et al v. Lee, et al, supra*, 758 F.2d at 1083).

The Court of Appeals quoted its leading case as the subject:

> If the court concludes that no environmental factor would be significantly degraded by the project, [defendants'] determination not to file the impact statement should be upheld. On the other hand, if the court

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[2] The statute is attached to the petition for writ of certiorari as Appendix E. The pertinent regulation is attached to this Brief in Opposition as Appendix A.

> finds that the project *may* cause a significant degradation of some human environmental factor (even though other environmental factors are affected beneficially or not at all), the court should require the filing of an impact statement or grant [plaintiffs] such other equitable relief as it deems appropriate.
>
> *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 466-67 (5th Cir. 1973) (emphasis added).

(*Id.*, at 1084.) The Court held that *Save Our Ten Acres* "remains the controlling precedent" in the circuit. (*Id.*, at 1084-1085.) The Court vacated and remanded to the District Court, stating:

> Based on the record before us, we cannot say that the district court would have granted summary judgment to defendants under the correct standard. The following are some examples of the environmental effects discussed in the record. The dredging will affect over two million acres of ecologically fragile water and wetland. By its very nature the dredging process is environmentally disruptive. A barge equipped with an excavating cutter-head digs through the shell deposits in reefs typically buried under four to eight feet of sediment. The shells are recovered through hydraulic suction. Other matter collected with the shells is diluted with wash water and then discharged. As the discharge settles, it creates an inorganic gel which spreads across the bottom and can suffocate benthic or bottom-dwelling life, such as vegetation or oysters. Nektonic life, (fish, crabs, or shrimp) can be affected by the dredging or if it disrupts their food supply. The process also increases the turbidity of the water, thereby reducing the light available for photosynthesis. Furthermore, it can also interfere with the process of delta-build-

> ing in the Atchafalaya River and with the health of living reefs and the formation of new reefs. The Corps has deemed the process sufficiently disruptive to prepare impact statements for dredging in Texas, Florida, and Alabama—each of which produces less shell than Louisiana.

(*Id.* at 1085.)

Proceedings have resumed in the District Court to implement the mandate of the Court of Appeals. Further briefs and affidavits have been submitted and certain discovery ordered by the District Court is under way. That Court had ordered the case submitted on reconsideration in January, 1986.

SUMMARY OF ARGUMENT

Petitioners failed to raise the issue before the Fifth Circuit which they now press upon this Court. Indeed, both the government and the Petitioner-Intervenors acknowledged in the Fifth Circuit the validity of the standard of review with which the latter now takes issue.

While different courts have differently verbalized the standard for judicial review of an agency's threshold determination not to prepare an environmental impact statement under NEPA, petitioners have failed to show that the different verbal formulations—each in use for well over a decade—in reality constitute different tests. Moreover, should there be a difference in emphasis, the searching scrutiny which the Fifth Circuit has long applied and which it continued to apply in this case is clearly the appropriate standard. An agency's determination completely to avoid the Congressionally determined

NEPA process should not too lightly escape judicial scrutiny.

ARGUMENT

I. PETITIONERS FAILED TO RAISE THE LEAD ISSUE IN THE COURT OF APPEALS WHICH THEY NOW URGE UPON THIS COURT, AND THE CASE DOES NOT OTHERWISE PRESENT AN APPROPRIATE OCCASION FOR A WRIT OF CERTIORARI

The Court of Appeals for the Fifth Circuit has applied, as it has since 1973, a reasonableness standard to see if there may be significant environmental impacts which, under the National Environmental Policy Act (NEPA), require an environmental impact statement. Respondents respectfully submit that this case presents no appropriate occasion for issuance of a writ of certiorari for the following reasons:

A. Petitioners failed to raise in the Court of Appeals the very issue which they now assert as error. In that court Petitioners themselves acknowledged the validity of the very reasonableness standard adherence which they now assert as a ground for issuance of the writ. (Contrast Petition for Writ of Certiorari at i with the following from Petitioners' Fifth Circuit brief: "The Corps' decision not to require preparation on EIS in connection with the issuance of the time extensions is to be reviewed under a standard of "reasonableness." (Brief of intervenors - Appellees in Fifth Circuit at 25.)[3]

[3] In the Court of Appeals the United States also asserted the validity of the very standard which the Intervenors and Petitioners

B. With respect to the other ground Petitioners assert as a basis for issuance of the writ, the continued adherence of the Fifth Circuit to the standard of requiring an environmental impact statement when the environmental assessment shows there may be significant environmental impacts, Petitioners omit to quote—or even to mention—the binding regulation that codifies the requirement, 40 C.F.R. 1508.3.[4]

C. The asserted "conflict" in the Circuits which Intervenors and Petitioners describe is illusory rather than substantive. While various courts over the years phrased their descriptions of the review of agency threshold decisions not to prepare environmental impact statements under NEPA in varying ways, Petitioners have failed to show how in application this results in different dispositions. (See para. II(A), *infra.*)

D. The record for Supreme Court review on this case

(shell dredging companies whose permits renewals are at stake) here contest. In the words of the United States' brief, "*The district court properly held 'hat review of the Corps' determination not to prepare an EIS should be on a standard of reasonableness based on the administrative record.* [footnote omitted]" (Brief for the Federal Appelles in 5th Cir. at 15); also see *id.* at 12. (Emphasis the government's)). See para. II, *infra.*

[4] The Council on Environmental Quality (CEQ) has adopted regulations to implement NEPA, 40 C.F.R. Parts 1500-1508, which this court has described as binding on all agencies. *Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979). NEPA requires an environmental impact statement for environmental impacts significantly affecting the quality of the human environment. §102(2) (C), 42 U.S.C. §4332(2) (C). The CEQ NEPA Regulations then define "affecting" as will or may have an effect on." 40 C.F.R. 1508.3. Why CEQ and the Court of Appeals are correct in their interpretation of the law we discuss at para. II, below.

is as yet incomplete in that the Court of Appeals has invited the District Court more fully to develop the record on issues peculiar to this case, including an explanation of why in 1982 the Corps of Engineers found numerous significant environmental impacts and in 1984 on reconsideration the Corps reversed itself repeatedly, finding such significance not to exist.[5]

Additionally, the Fifth Circuit requested a comparison of the environmental impacts were the permits to be

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[5] The Corps of Engineers prepared environmental assessments in 1982 which clearly asserted numerous significant environmental effects. This lawsuit was then commenced. The Corps then asked for and received permission of the District Court to reconsider. It did so, changing (in 1984) the environmental assessments so as to revise or at least minimize any reference to "significant" environmental impacts (which would require an environmental impact statement). It was to this question-provoking set of developments that Chief Judge Clark of the Fifth Circuit referred when he said, speaking for the court:

> The many differences between the 1982 and 1984 environmental assessments also raise questions. The 1984 document reaches conclusions opposite to many of those reached in the 1982 report. Every change tends to minimize the environmental significance of the continuation of the dredging. The record leaves the reasons for these changes unclear. Plaintiffs maintain that the conditions imposed by the 1984 permits are similiar in many respects to those in place in 1982 and even in the 1977 permits. The defendants did not respond to plaintiffs' assertion that the changes in the conditions were insufficient to warrant the changes made in the environmental assessment. We reach no conclusion as to the validity of the 1984 assessment but remind the district court that, to some extent, the 1984 assessment is a "post hoc rationalization and thus must be viewed critically." *Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S. Ct. 814, 826, 28 L. Ed. 2d 136 (1971).*

State of Louisiana, et al v. Lee, et al., supra, 758 F.2d at 1085.

extended five years with the impacts were the permits not to be reissued.[6]

Since remand further proceedings have continued in the District Court. All parties have submitted further affiants to that court, addressed in part to the issues described above. The District Court has ordered that the affiants be deposed and that any concluding memoranda be filed prior to the anticipated resubmission of the case in January, 1986.

In brief, the procedural posture of this case makes Supreme Court review at this stage inappropriate. (See *Brotherhood of Locomotive Firemen v. Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967); Stern and Gressman, *Supreme Court Practice*, § 419 (5th Ed. 1978).)

E. The case has been correctly decided by the Fifth Circuit, as we discuss in para. II, below.

II. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT DID NOT ERR WHEN IT ADHERED TO ITS LONGSTANDING STANDARD OF REVIEW FOR THE THRESHOLD DECISION WHETHER NEPA REQUIRES AN EIS.

Though presented by Petitioners as one question, there are two aspects to the Fifth Circuit's standard of review for the threshold question whether to prepare an

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[6] As stated by the Court of Appeals:

> In deciding this case on remand, the trial court should compare the projected ecological status of the affected areas if the dredging is continued for another five years with their projected condition if the dredging is halted now.

(*Id.* at 1086.)

environmental impact statement under NEPA with which Petitioners take issue. One relates to the longstanding reasonableness standard employed by that Court, and the other to the equally longstanding requirement that the statement is to be prepared whenever a major Federal action may significantly affect the quality of the human environment.[7] Petitioners failed to raise the first issue in the Court of Appeals and fail totally to make any showing of error as to the second issue.

The Fifth Circuit was correct in both aspects of its standard. We discuss each.

A. The Fifth Circuit was Correct in its Application of the Rule of Reason or Reasonableness Standard.

The Fifth Circuit's approvals to the threshold decision whether to prepare an EIS is a wise and even necessary one. It is important to realize just what is being judicially reviewed in such a threshold decision. It is not the informed exercise of agency discretion, to which considerable deference is appropriately due. Rather what is being reviewed is the initial agency decision whether or not to inform its own discretion, preparing the environmental impact statement that will provide the information which will enable the decisionmakers and the public accurately to evaluate the environmental consequences prior to coming to conclusions. An agency should not

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[7] Petitioners refer to a "reasonableness plus" standard supposed to have been invented in this case. (Petitioners for Writ of Certiorari at 4, 7.) In fact, both elements of the test applied by the Fifth Circuit in this case were applied as far back as *Save Our Ten Acres v. Kreger*, *supra*, 472 F.2d at 465, 467 (5th Cir. 1973).

lightly be enabled to bypass the entire Congressionally-created environmental impact statement process with a cursory assessment.

It was the Fifth Circuit itself twelve years ago which clearly articulated the rationale for a searching scrutiny of the threshold decision:

> NEPA was intended not only to insure that the appropriate responsible official considered the environmental effects of the project, but also to provide Congress (and others receiving such recommendation or proposal) with a sound basis for evaluating the environmental aspects of the particular project or program. The spirit of the Act would die aborning if a facile, ex parte decision that the project was minor or did not significantly affect the environment were too well shielded from impartial review. Every such decision pretermits all consideration of that which Congress has directed be considered "to the fullest extent possible." The primary decision to give or bypass the consideration required by the Act must be subject to inspection under a more searching standard.

Save Our Ten Acres v. Kreger, *supra*, 472 F.2d 463, 466 (5th Cir. 1973).[8] This standard has been followed by most

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[8] Other courts have explained why the reasonableness standard is appropriate. The arbitrary and capricious standard is primarily applicable to reviewing an agency's discretionary decisions. The decision to prepare an EIS, however, is not committed to the agency's discretion. An EIS must be prepared for actions that may significantly affect the quality of the human environment. The mandatory nature of this directive makes the "reasonableness" standard more appropriate. *Foundation for North American Wild Sheep v. U.S. Department of Agriculture*, 681 F.2d 1172, 1177, n.24 (9th Cir. 1982); *see Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244, 1248-49 (10th Cir. 1973).

of the courts[9] and has been approved by the commenters.[10]

An appropriate judicial solicitude for the discretion of administrative agencies properly attaches when, based on whatever record the law requires, such informed discretion is exercised. The decision not to prepare an EIS, however, is a decision not to inform that discretion and therefore invites a more exacting judicial scrutiny.

While Respondents urge that the Fifth Circuit acted properly in its continued reliance upon the reasonableness standard, they also note that Petitioners have failed to demonstrate that the verbal formulation is in fact a substantive rather than an illusory distinction. The First Circuit, for instance, looked at the "various legal formu-

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[9] In addition to the Fifth Circuit, see *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314, 1320 (8th Cir. 1974) (*en banc*); *City of Davis v. Coleman*, 521 F.2d 661, 673 (9th Cir. 1975); *Wyoming Outdoor Coordinating Council v. Butz, supra*, 484 F.2d at 1248-49 (10th Cir. 1973); *National Wildlife Federation v. Marsh*, 721 F.2d 767, 782 (11th Cir. 1983); also see *Lower Alloways Creek Township v. Public Service Electric and Gas Co.*, 687 F.2d 732, 742 (3d Cir. 1982). Courts following the arbitrary and capricious standard include *Hanly v. Kleindienst*, 471 F.2d 823, 829-830 (2d Cir. 1972), *cert. den.* 412 U.S. 908 (1973); *City of Alexandria v. Federal Highway Administration*, 756 F.2d 1014, 1017 (4th Cir. 1985); *River Road Alliance v. Corps of Engineers*, 764 F.2d 445, 449 (7th Cir. 1985).

[10] In the words of Dean Frederick Anderson, NEPA's leading scholar, "The policy and goals of the Act suggest that the approach of *Save Our Ten Acres* is correct. . . ." Anderson, *The National Environmental Policy Act* in Dolgin and Guilbert, Environmental Law Institute, *Federal Environmental Law*, West Pub. Co., at 361 (1974). The basic rationale is that NEPA, unlike other statutes, is a self regulation statute, and there is nobody, except the courts, to keep agencies from totally flouting the EIS requirement. *Id.; see* Rodgers, *Handbook on Environmental Law*, West Pub. Co., at 751 (1977).

lae" and then declined to "enter the luxurient jungle of differing review descriptions." *Quinonez - Lopez v. Coco Lagoon Development Corp.*, 733 F.2d 1, 3 (1st Cir. 1984). That court suggested that "whatever verbal formulation it applies" the court "must essentially look to see if the agency decision, in the context of the record, is too 'unreasonable' (given its statutory and factual context) for the law to permit it to stand." *Sierra Club v. Marsh*, 769 F.2d 868, 871 (1st Cir. 1985). Similarly the Sixth Circuit examined both standards, and then concluded, "No matter what standard courts have used, they have to look to see whether the Corps made a reasoned determination." *Boles v. Outon Dock, Inc.*, 659 F.2d 74, 75 (6th Cir. 1981). The Third Circuit said it found it unnecessary to join either group of opposing circuits, but then applied the reasonableness test. *Lower Alloways Creek Township v. Public Service Electric and Gas Co., supra*, 687 F.2d at 742 (3d Cir. 1982). The District of Columbia Circuit appears without difficulty to equate and apply the differing tests. See *Maryland - National Capital Park and Planning Commission v. U.S. Postal Service*, 487 F.2d 1029, 1039 n.7 (D.C. Cir. 1973); *Committee for Auto Responsibility v. Solomon*, 603 F.2d 992, 1002-03 (D.C. Cir. 1979); *Peshlakai v. Duncan*, 476 F. Supp. 1247, 1252 (D.D.C. 1979). Perhaps the Seventh Circuit had the most appropriate summary: "[W]e are not sure how much if any practical difference there is between 'abuse of discretion' and 'unreasonable.'" *River Road Alliance v. Corps of Engineers, supra*, 784 F.2d at 449 (7th Cir. 1985); see *City of Alexandria v. Federal Highway Administration, supra*, 756 F.2d at 1017 (4th Cir. 1985) (to similar effect). Petitioners have certainly not shown any.

B. The Fifth Circuit was Correct in Requiring Preparation of an Environmental Impact Statement When a Major Federal Action May Significantly Affect the Quality of the Human Environment.

The formulation of the scope of NEPA's EIS requirement have been variously stated by the courts.[11] The statement is required if the action "may cause a significant degradation of some environmental factor" (*Save Our Ten Acres v. Kreger*, 472 F.2d 463, 467 (5th Cir. 1973); *State of Louisiana v. Lee, supra*, 758 F.2d at 1085 (5th Cir. 1985)); if the action "*may* significantly degrade some human environmental factor" (*Foundation for North American Wild Sheep v. U.S. Department of Agriculture, supra*, 681 F.2d at 1178 (9th Cir. 1982); if it "could have a significant effect on the environment" (*Minnesota Public Interest Research Group v. Butz, supra*, 498 F.2d at 1320 (8th Cir. 1974) (*en banc*); if there was a "substantial possibility" that agency action "could" have a significant impact (*Sierra Club v. Marsh, Supra*, 769 F.2d at 871 (1st Cir. 1985); if it "*arguably* will have an adverse environmental impact" (*Students Challenging Regulatory Agency Procedure v. United States*, 346 F. Supp. 189, 201 (D.D.C. 1972) (three judge court), rev'd as other grounds, 412 U.S. 669 (1973) (emphasis in original); if it has a "potentially significant adverse effect" (*Hanly v. Kleindienst*, 471 F.2d 823, 831 (2d Cir. 1972), *cert. denied* 412 U.S. 908 (1973));[12] and "whenever it can be fairly ar-

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[11] Generally see W.H. Rodgers, *Environmental Law* § 7.6, at 754-755 (1977), who summarizes many of these "[f]ormulations popularized by the courts."

[12] One may note that while Petitioners attempt to create a dichotomy between the Second and Fifth Circuits on the standard of

gued on the basis of substantial evidence that the project may have a significant environmental impact" (*No Oil, Inc. v. Los Angeles*, 13 Cal. 3d 68, 75, 82-86, 52 P.2d 66, 70, 75-78, 118 Cal. Rptr. 34, 38, 43-46 (Cal. S.C. 1974) (interpreting a state NEPA analogue).

The case law, aptly described as a "common law of NEPA" (*Kleppe v. Sierra Club*, 427 U.S. 390, 421 (1976) (Marshall J., concurring in part and dissenting in part)) was in large part codified in the Council on Environmental Quality (CEQ) NEPA Regulations through what this Court described as the "detailed and comprehensive process ordered by the President, of transforming advisory guidelines into mandatory regulations applicable to all federal agencies." (*Andrus v. Sierra Club*, *supra*, 442 U.S. at 358 (1979)).[13]

The CEQ NEPA Regulations define "affecting", a statutory predicate for an EIS (NEPA, § 102 (2) (C), 42 U.S.C. § 4332 (2) (C)), as "will or may have an effect on." 40 C.F.R. 1508.3. Both "will" and "may" are used both to reflect the case law and accurately to implement the

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review of threshold determinations not to prepare environmental impact statements, both Circuits have long agreed that certainty or impact is not a precondition to statement preparation. Indeed, petitioners do not make any showing of a division among the circuits on this point.

[13] The CEQ NEPA Regulations when promulgated had the distinction unique in environmental regulation of being welcomed by institutions as diverse as the United States Chamber of Commerce, The National Governors' Association, the National Wildlife Federation, and the Natural Resources Defense Council. Yost, *Streamlining NEPA—An Environmental Success Story*, 9 B.C. Envtl. Aff. L. Rev. 507, 509 (1981-1982). They have remained in effect, unchanged, through the change of administrations.

Congressional intent. If there will not be a significant environmental impact, no EIS is required by NEPA. But the converse situation—when an agency does not know enough to say there "will be" no significant impact—necessarily includes both the situations where it is already known that there will be significant impacts and where all that is known is that there may be such impacts. (See *State of Louisiana* v. *Lee*, *supra*, 758 F.2d at 1085).[14]

Both the case law and the regulations support the analysis of the Fifth Circuit.

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[14] The total number of environmental impact statements prepared under this threshold standard remains a modest one given the pervasiveness of federal activity, both directly undertaken and by way of funding, permission, or leasing of private, state, and local action. According to the Council on Environmental Quality's last released report covering the proceeding year, in 1983 all Federal agencies together produced 677 draft, final, and supplemental statements. (Council on Environmental Quality, *Environmental Quality 1983, the 14th Annual Report to Council on Environmental Quality* at 333 (1984).) Since all statements are released in both draft and final, and some are supplemented, this means that the total number of "major Federal actions significantly affecting the quality of the human environment" (NEPA, § 102(2)(C)) was only in the neighborhood of 300. NEPA litigation is of similarly modest proportions. In the most recently released figures, those for 1982, a total of 157 lawsuits were filed based in whole or in part on NEPA. (CEQ, *Environmental Quality 1983*, *supra*, at 265.) The two principal categories of complaints alleged the inadequacy of environmental impact statements and the failure to prepare such statements. (*Id.* at 266.) Petitioners' apparent apprehensions about the "may" threshold (Petition for Writ at 11) are in historical fact ill-founded.

CONCLUSION

For the foregoing reasons respondents respectfully submit that the writ of certiorari should be denied.

Respectfully submitted,

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October 29, 1985

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APPENDIX A

40 C.F.R. 1502.3:

§ 1502.3 Staturory requirements for statements.

As required by sec. 102(2)(C) of NEPA environmental impact statements (§ 1508.11) are to be included in every recommendation or report

On proposals (§ 1508.23)

For legislation and (§ 1508.17)

Other major Federal actions (§ 1508.18)

Significantly (§ 1508.27)

Affecting (§ § 1508.3, 1508.8)

The quality of the human environment (§ 1508.14).

40 C.F.R. 1508.3:

§ 1508.3 Affecting.

"Affecting" means will or may have an affect on.

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NO. 85-569

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I - *Introductory Statement*

The Petition for Writ of Certiorari was filed timely on October 2, 1985.[1] On October 31, 1985, Respondents[2] filed a brief in opposition. Although Respondents' arguments were largely anticipated and refuted in the Petition, Petitioners submit this short reply brief pursuant to Rule 22.5 to address certain issues raised for the first time in Respondents' brief in opposition.

II - *The Case is in a Proper Procedural Posture for Resolution by this Court.*

Respondents have urged that this case is inappropriate for the issuance of a writ of certiorari because no challenge to the validity of the "reasonableness" test was pressed before the Court of Appeals. Brief in Opposition, p. 5. That position is specious and illogical. At the time Respondents made their appeal to the Fifth Circuit, that court unequivocally applied the reasonableness test. *Save Our Wetlands, Inc. v. Sands*, 711 F.2d 634, *reh. den.*, 718 F.2d 1096 (5th Cir. 1983); *Save Our Ten Acres v. Kreger*, 472 F.2d 463 (5th Cir. 1973). The facts of the case supported the argument that the reasonableness test, as it then existed, had been satisfied. Petitioners' logical argument before the Fifth Circuit was that the district court had correctly applied the reasonableness standard (as it then applied in the circuit), and had reached the correct result.

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[1] Petitioners are Dravo Basic Materials Company, Inc., Pontchartrain Materials Corporation, and Louisiana Materials Company, Inc. *See* Petition for Writ of Certiorari, p. i.

[2] Respondents are the State of Louisiana, Save Our Coast, Inc., The Orleans Audubon Society, Sierra Club, Manchac Fisherman's Association, and Environmental Defense Fund.

Even more importantly, a major element of Petitioners' argument is that the Fifth Circuit went beyond its own reasonableness test, which had been applied by the district court, to devise its new "reasonableness plus" standard. Petition for Writ of Certiorari, p. 4. In so doing, it has effectively increased the split among the circuits by creating what amounts to a third standard. It would have been futile for Petitioners to attempt to dissuade the Fifth Circuit from applying its well settled reasonableness standard, and inappropriate for them even to try to do so considering that the district court, applying that standard, had held in their favor. In any event, it clearly would have been impossible for Petitioners to prophesy that the Fifth Circuit would confect a new test, much less to argue in advance against the imposition of that new test.

Additionally, Respondents argue that the present procedural posture of the case makes it inappropriate for review by this Court because the case was remanded to the district court by the Fifth Circuit. Brief in Opposition, pp. 6-8. However, certiorari may issue to review a judgment ordering a remand when the review of the order is "fundamental to the further conduct of the case." *United States v. General Motors Corp.*, 323 U.S. 373, 65 S. Ct. 357, 359, 89 L. Ed. 311 (1945); *see* also *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 36 S. Ct. 357, 358, 60 L. Ed. 713 (1916)[3]; *Forsyth v. City of Hammond*, 166 U.S. 506, 17 S. Ct. 665, 666, 41 L. Ed. 1095 (1897); Stern and Gressman, *Supreme Court Practice* §419, p.181. The issue presented by this Petition -- the correct threshold standard to be applied by the reviewing court -- is clearly of fundamental

[3]*Hanover Star Milling Co. v. Metcalf* was superseded on other grounds by statute as stated in *Foxtrap, Inc. v. Foxtrap, Inc.*, 671 F.2d. 636 (D.C. Cir. 1982) and in *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, ___ U.S. ___, 105 S. Ct. 658, 83 L. Ed. 2d 582 (1985).

importance to the outcome of the case, a point which is not disputed by Respondents. It is also important to the development of the law in this area, and could not be better presented for definitive resolution by this Court either later in this case or in another case. Hence, pursuant to the applicable jurisprudence, review by this Court at this time is clearly appropriate.

This case presents a classic example of when certiorari *should* issue: to resolve conflicts among the circuits as to fundamentally important questions of law. *United States v. General Motors Corp.*, 65 S. Ct. at 358; *Hanover Star*, 36 S. Ct. at 358. The conflict among the circuits as to the proper standard to be applied in determining the appropriateness of an agency decision not to require the preparation of an environmental impact statement is indisputable, despite Respondents' weak attempt to characterize the conflict as "illusory." Petition for Writ of Certiorari, pp. 4-10; Brief in Opposition, pp. 6, 11-12. The Fifth Circuit's ruling below not only reflects but actually exacerbates the split among the circuits, and further demonstrates the need for this Court to resolve the issue definitively.[4]

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[4]Even absent the particular circumstances of this case, the procedural objections raised by Respondents would not be a bar to this Court's review of the Fifth Circuit's ruling. "Although [the Supreme Court] do[es] not ordinarily consider questions not specifically passed upon by the lower court ... this rule is not inflexible, particularly in cases coming ... from the federal courts." *Capital Cities Cable, Inc. v. Crisp*, ___ U.S. ___, ___, 104 S. Ct. 2694, 2699, 81 L. Ed. 2d 580 (1984). This Court properly takes into consideration circumstances which justify the granting of certiorari on issues which were not pressed or passed upon in the lower courts. *Youakim v. Miller*, 425 U.S. 231, 234, 96 S. Ct. 1399, 1401, 47 L. Ed. 2d 701 (1976).

III - *The Ruling Below Creates a New, Onerous and Improper "Reasonableness Plus" Standard.*

The Respondents contend that the ruling below does not create a new "reasonableness plus" standard, but merely restates faithfully a "test applied by the Fifth Circuit . . . as far back as *Save Our Ten Acres v. Kreger, supra*, 472 F.2d at 465, 467 (5th Cir. 1973)." Respondents' Brief in Opposition, p. 9, n.7. That statement is both misleading and inaccurate. In *Save Our Ten Acres*, the Fifth Circuit first stated the reasonableness standard which it applied consistently thereafter until rendition of the opinion in this case:

> Under the review standard we hold is required, the court must determine whether the plaintiff has alleged facts which, if true, show that the recommended project would materially degrade any aspect of environmental quality . . .
>
> * * *
>
> Since [plaintiff] has raised substantial environmental issues concerning the proposed recommended project here, the court should proceed to examine and weigh the evidence of both the plaintiff and the agency to determine whether the agency reasonably concluded that the particular project would have no effects which would significantly degrade our environmental quality. . . . If the court concludes that no environmental factor would be significantly degraded by the project, [defendant's] determination not to file the

> impact statement should be upheld. On the other hand, if the court finds that the project may cause a significant degradation of some human environmental factor (even though other environmental factors are affected beneficially or not at all), the court should require the filing of an impact statement or grant [plaintiff] such other equitable relief as it deems appropriate.

Save Our Ten Acres, 472 F.2d at 466-67.

In this case, the district court accurately stated and applied the Fifth Circuit's reasonableness standard. *State of Louisiana v. Lee*, 596 F. Supp. 645, 651-52 (E.D. La. 1984); *see* also Petition for Writ of Certiorari, pp. A-24 through A-27. The Fifth Circuit clearly created a new and more onerous standard by holding that the district court's approach "subjected plaintiffs to an improper evidentiary burden," and by reformulating the "reasonable" test into a requirement that there be "no reasonable possibility" of environmental harm:

> Under *Save Our Ten Acres*, plaintiffs must establish only that the Corps was unreasonable in concluding that there was *no reasonable possibility* that the proposed action would significantly degrade any environmental factor (emphasis added).

State of Louisiana v. Lee, 758 F.2d 1081, 1085 (5th Cir. 1985); *see* also Petition for Writ of Certiorari, pp. A-7, A-8.

The ruling below clearly goes far beyond the reasonableness standard that had been applied previously by the Fifth Circuit, and which is applied by other circuits which follow the original reasonableness test.

IV - *There is a Genuine and Deep Conflict Among the Circuits, and that Conflict Ought to be Resolved by this Court.*

Without doubt the Respondents' most inventive argument is that the split among the circuits on the critical threshold question which forms the crux of this Petition is in fact "illusory rather than substantive." Brief in Opposition, pp. 6, 11-12. Sustaining this argument would require the Respondents to render clear language meaningless and to harmonize the irreconcilable.

Both this Court and the Fifth Circuit have recognized the serious conflict among the circuits, a fact conveniently ignored by Respondents. The Fifth Circuit has stated recently:

> An agency's decision to act without preparing an EIS is of course subject to judicial review. The circuits are, however, split on how that review should be conducted. In roughly half of the circuits that have decided the issue, a decision not to prepare an EIS will be overturned only if it is 'arbitrary and capricious.' Other circuits employ a 'reasonableness' standard of review. There are, moreover, considerable variations within these two general categories. [Citation omitted.] "This conflict is not merely semantic or academic.' *Gee v. Boyd*, ___ U.S. ___, 105 S. Ct. 2123, 2125, 85 L. Ed. 2d 487 (1985)(White, J., dissenting). [Footnote omitted.] In fact, three justices of the Supreme Court have recently argued that the full Court should review a case like this one to end the

> 'disarray' and 'confusion' that exists on this issue. *Id.* 105 S.Ct at 2126 (White, J., joined by Brennan, J. & Marshall, J., dissenting from denial of petition for writ of certiorari).

Fritiofson v. Alexander, 772 F.2d 1225, 1237 (5th Cir. 1985).

Circuit court opinions on the standard of judicial review of an agency decision to proceed with a major federal action without preparation of an EIS run the gamut. Some circuits have held the decision to be a fact-sensitive inquiry which should not be overturned unless manifestly arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[5] Other circuits have required the agency decision to be "reasonable."[6] The ruling below sets forth a third standard and requires "plaintiffs ... [to] establish *only* that the Corps was *unreasonable* in concluding there was *no reasonable possibility* that the proposed action would significantly degrade *any* environmental factor."[7] (Emphasis added). Respondents attempt to harmonize that range of opinion into a "common law of NEPA." Brief in Opposition, p. 14. Logically and legally it cannot be done. Respondents cannot deny (and do not

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[5] *Hanly v. Kleindienst*, 471 F.2d 823, 828-30 (2nd Cir. 1982), *cert. den.*, 412 U.S. 908, 93 S. Ct. 2290, 36 L. Ed. 2d 974 (1973).

[6] *Minnesota Public Interest Reseach Group v. Butz*, 498 F.2d 1314 (8th Cir. 1974); *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975); *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244 (10th Cir. 1973).

[7] *State of Louisiana v. Lee*, 758 F.2d 1081, 1085 (5th Cir. 1985)(emphasis added); Petition for Writ of Certiorari, p. A-8.

attempt to deny) that the threshold decision whether to prepare an EIS is of fundamental importance, nor can it seriously be disputed that the approaches and answers to that question differ radically in the various circuits. Petition for Writ of Certiorari, pp. 4-10. The solution to that problem lies not in the creation of a wishful and imaginary common law of NEPA, but rather in this Court's definitive resolution of the issue.

V - *Conclusion*

For the foregoing reasons, and for the reasons set forth in their original Petition, Petitioners respectfully submit that a writ of certiorari should issue, and that the judgment of the Fifth Circuit should be reviewed and, after due proceedings, reversed.

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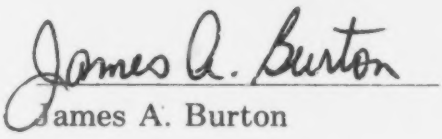
December 17, 1985

CERTIFICATE OF SERVICE

I certify that copies of the foregoing reply brief have been served by United States Mail, postage prepaid, on counsel of record for Respondents and all other parties as identified previously on the list filed pursuant to Rule 28..

New Orleans, Louisiana, December 17, 1985.



James A. Burton

Supreme Court, U.S.
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No. 85-569

In the Supreme Court of the United States

OCTOBER TERM, 1985

DRAVO BASIC MATERIALS COMPANY, ET AL., PETITIONERS

v.

STATE OF LOUISIANA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals applied the correct standard of review in determining that the Corps of Engineers erred in declining to prepare an environmental impact statement before granting permits for dredging in navigable waters.

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MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 758 F.2d 1081. The opinion of the district court (Pet. App. A16-A39) is reported at 596 F. Supp. 645.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1985, and rehearing was denied on June 5, 1985 (Pet. App. A13-A14). On September 3, 1985, Justice White extended the time in which to file a petition for a writ of certiorari to and including October 3, 1985 (Pet. App. A15), and the petition was filed on October 2, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, requires all federal agencies to develop procedures, in consultation with the Council on Environmental Quality (CEQ), to insure that environmental considerations are given appropriate consideration in agency decision making (42 U.S.C. 4332(B)), and that an Environmental Impact Statement (EIS) is included in every recommendation or report on "major Federal actions significantly affecting the quality of the human environment" (42 U.S.C. 4332(C)).

Procedures developed by the CEQ to implement these mandates divide agency action into three basic types: for minor actions that, as a class, are environmentally inconsequential, an agency may categorically exclude any NEPA review (40 C.F.R. 1501.4(a)(2)); for other actions that are indisputably major in nature and have the potential for a significant effect upon the human environment, a full-blown EIS is required (40 C.F.R. 1501.4(a)(1)); but for a large number of agency actions falling between these two extremes, the agency must prepare an Environmental Assessment (EA) in order to determine whether an EIS is necessary. 40 C.F.R. 1501.4(b). If the EA indicates that there is no significant environmental impact attributable to the proposal, the agency prepares a Finding Of No Significant Impact (FONSI).

2. a. This case concerns permits issued by the Corps of Engineers to private parties under Section 404 of the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. 1344, and Section 10 of the Act. of Mar. 3, 1899 (Rivers and Harbors Act of 1899), 33 U.S.C. 403, permitting the dredging of shells in two areas of water in southern Louisiana, a "Gulf Coast Area," consisting of several bays in the Gulf of Mexico (Atchafalaya, East and West Cote Blanche, Four League and Vermillion), and a "Lakes Area," consisting of Lakes Pontchartrain and Maurepas. These areas had been dredged prior to the

issuance of the permits at issue here, which simply extended pre-existing Corps of Engineers permits. Before issuing the new permits, the Corps of Engineers prepared an EA which concluded that the permits as proposed (*i.e.* with the inclusion of certain mandatory protective conditions) would not have a significant effect on the quality of the human environment. The Corps therefore prepared a FONSI, rather than an EIS.

b. In the Gulf Coast area, the dredges collect oyster shells deposited in reefs ranging from one foot to eight feet in thickness that lie under four to eight feet of silty clay sediment. The dredges cut the mud and sediment and break up the underlying cementlike shell deposits. All this material is sucked up into the boat over a series of sizing screens and rotary washers. Material over 1/8 of an inch in diameter is saved; the rest is directed back into the water, where most of it settles. Two or three dredges are typically operating in these areas at all times. Respondents argued below that this dredging would create water quality problems; would affect fishing and the marine habitat, and might increase storm damage to the coastline. They also argued that the Atchafalaya Bay Delta, an ecologically active and unique area of emerging land, would be significantly harmed by the dredging (Pet. App. A27-A30).

The clam shells dredged in the Lakes Area do not occur in reefs. There, a rotary cutter is used to cut through the shell-bearing bottom sediment and the material is sucked on board the dredge and sized. The sediment is diluted with wash water and discharged from the rear of the dredge. Respondents claimed below that this discharge would cover plants and animals living on and in the lake bottoms and that the dredging would significantly increase turbidity and decrease water quality (Pet. App. A30-A33).

3. The State of Louisiana and five private environmental groups filed this case on December 20, 1983, against

responsible officials in the Corps of Engineers and the Army. Later, the companies performing the shell-dredging, petitioners in this Court, intervened as defendants. Pet. App. A2.

On September 18, 1984, the district court granted summary judgment to the federal defendants and petitioners. It stated, in agreement with all the parties, that if no conditions were imposed, the dredging would have a significant effect on the quality of the human environment. The court, however, determined that it was proper for the agency's environmental assessment to be based on the understanding that specific mandatory conditions would be included in the permits that would diminish the environmental harm. On that basis, it found that the Corps acted reasonably in not preparing an EIS (Pet. App. A34-A39).

The court of appeals reversed (Pet. App. A1-A12). First, it agreed with the district court that mitigation measures in a permit may bring the environmental effects of that permit below the level of significance, so long as those measures are concrete and mandatory. It was accordingly proper for the Corps and the district court to consider the permit restrictions in determining whether an EIS was required (Pet. App. A4-A5).

But the appellate court found that the district court had applied the wrong standard of review in evaluating the Corps' decision not to prepare an EIS. The court of appeals characterized the district court's approach as follows (Pet. App. A7 (citation omitted; brackets and emphasis in original)):

> In the case before us, the district court correctly required the plaintiffs to demonstrate the necessity of an impact statement. However, the district court also stated that an impact statement was to be required "if the [environmental assessment] reveals that the quality of human environment *would be* significantly degraded by the proposed action . . . ." 596 F. Supp. at 651 * * * . This language indicates that the

> district judge subjected plaintiffs to an improper evidentiary burden. The court appears to have required plaintiffs to prove a significant degradation of the environment actually would result before the Corps' conclusion could be deemed unreasonable. Such a standard would be unrealistic. Plaintiffs would have to prove an absolute without the benefit of the factual basis Congress intended to provide by an impact statement.

The court of appeals concluded that the plaintiffs need show only that the environment *may* be significantly degraded by the major federal action in order to require the preparation of an EIS (Pet. App. A7). The court of appeals directed the district court on remand to "review the evidence carefully to ensure that the Corps was reasonable in concluding that there is no possibility that the dredging *may* cause a significant degradation of some environmental factors" (Pet. App. A9 (emphasis in the original)).

ARGUMENT

Petitioners ask this Court to resolve an apparent conflict in the circuits over the appropriate standard for judicial review of an agency decision not to prepare an EIS. The court below tested the agency decision by a "reasonableness" standard, rather than applying the Administrative Procedure Act (APA) "arbitrary and capricious" standard (see 5 U.S.C. 706).

1. We have several times informed this Court of our view that there is basically only a semantic distinction between those two standards, most recently in *Gee* v. *Boyd*, cert. denied, No. 84-1062 (Apr. 22, 1985). That case, like this one, involved a decision by the Corps of Engineers to prepare a FONSI rather than an EIS before issuing a permit for dredging in navigable waters. In our opposition to the petition in that case, we explained that there appeared

to be no practical difference in outcome resulting from application of the "reasonableness" test—rather than the "arbitrary and capricious" test—to review an agency decision not to prepare an EIS. We noted that the circuits are sharply divided on the semantic issue, but observed that several courts of appeals have questioned whether there is any functional difference between the two tests.[1]

An agency may dispense with the preparation of an EIS for a major federal action if it determines that the proposed action will have no significant effect on the quality of the human environment. See the CEQ Regulations, 40 C.F.R. 1508.13; *Sierra Club* v. *Marsh,* 769 F.2d 868, 876 (1st Cir. 1985); *Friends of Engangered Species, Inc.* v.

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[1] Five circuits test an agency's determination not to prepare an EIS under the traditional arbitrary and capricious standard for review of agency action. *Grazing Fields Farm* v. *Goldschmidt,* 626 F.2d 1068, 1072 (1st Cir. 1980); *Hanly* v. *Kleindienst,* 471 F.2d 823, 828-829 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973); *Webb* v. *Gorsuch,* 699 F.2d 157, 159 (4th Cir. 1983); *Nucleus of Chicago Homeowners Ass'n* v. *Lynn,* 524 F.2d 225, 229 (7th Cir. 1975), cert. denied, 424 U.S. 967 (1976); *Sierra Club* v. *Peterson,* 717 F.2d 1409, 1413 (D.C. Cir. 1983).

Four other circuits have enunciated a "reasonableness" standard of review. *Save Our Ten Acres* v. *Kreger,* 472 F.2d 463, 466 (5th Cir. 1973); *Winnebago Tribe* v. *Ray,* 621 F.2d 269, 271 (8th Cir.), cert. denied, 449 U.S. 836 (1980); *Foundation for North American Wild Sheep* v. *United States Dep't of Agriculture,* 681 F.2d 1172, 1178 (9th Cir. 1982); *Wyoming Outdoor Coordinating Council* v. *Butz,* 484 F.2d 1244, 1249 (10th Cir. 1973). The Eleventh Circuit presumably falls within this grouping as well, by virtue of *Bonner* v. *City of Prichard,* 661 F.2d 1206 (1981) (en banc) (adopting as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981).

The Third Circuit has applied the reasonableness test in one case, but withheld judgment on whether that standard would be proper in all cases. *Town of Lower Alloways Creek* v. *Public Service Electric & Gas Co.,* 687 F.2d 732 (1982). The Sixth Circuit has declined to choose between the two standards. *Boles* v. *Onton Dock, Inc.,* 659 F.2d 74, 75-76 (1981).

Jantzen, 760 F.2d 976, 986 (9th Cir. 1985). Although that principle is clear, the determination of significance will often require the exercise of discretion (see *City of New York* v. *United States Dep't of Transportation*, 715 F.2d 732 (2d Cir. 1983), cert. denied, 465 U.S. 1055 (1984)), including a judgment as to possible uncertainties.[2] Accordingly, both the "reasonableness" standard and the "arbitrary and capricious" standard grant a measure of deference to an agency's exercise of that discretion in making the determination of no significant environmental impact. See *River Road Alliance, Inc.* v. *Corps of Engineers*, 764 F.2d 445, 449 (7th Cir. 1985), petitions for cert. pending, Nos. 85-785 & 85-800 ("There is plenary review and there is deferential review, and whether it is fruitful to attempt fine gradations within the second category may be doubted * * *.").[3] Thus, in its opinion in this case, the Fifth Circuit stated that if the agency's decision is "reasonable," made "objectively" and "in good faith on a reviewable environmental record," it " 'must be upheld.' " Pet. App. A5, quoting *Save Our Wetlands* v. *Sands*, 711 F.2d 634, 644 (5th Cir. 1983).

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[2] See Judge Friendly's dissent in *Hanly* v. *Kleindienst*, 471 F.2d 823, 837 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973), noting a "spectrum" of interpretations for the word "significance" as used in NEPA.

[3] We nevertheless see no justification for departing from the traditional APA standard for review of a FONSI, which is, in the NEPA context, the final agency action. See *National Helium Corp.* v. *Morton*, 486 F.2d 995, 1001-1002 & n.5 (10th Cir. 1973), cert. denied, 416 U.S. 993 (1974) (distinguishing between "arbitrary and capricious" review for decision not to prepare EIS and "reasonableness" review for factual sufficiency of EIS). Although this Court has not addressed the issue directly, it has assumed that the arbitrary and capricious standard applies. In *Kleppe* v. *Sierra Club*, 427 U.S. 390, 412 (1976), the Court held that an agency's decision not to prepare a "regional" EIS in the absence of a proposal for "regional" action should be upheld "[a]bsent a showing of arbitrary action."

2. We are nevertheless concerned, quite apart from the court's re-assertion of its use of the "reasonableness" standard of review, that the opinion below may presage a departure from the degree of deference previously afforded and may lead to serious restrictions on an agency's discretion to determine that an EIS is not required.

In our opposition in *Gee* v. *Boyd*, *supra*, we noted (at 7) that in the circuits adopting the "reasonableness" test, a plaintiff had to make a rather strong showing of the likelihood of an effect on the environment to prevail on its suit. See, *e.g.*, *Sierra Club* v. *Marsh*, 769 F.2d at 870 (requiring a "substantial possibility" that the action will significantly affect the quality of the human environment). In the instant case, however, the Fifth Circuit has now required the plaintiffs to establish "only that the Corps was unreasonable in concluding there was *no* reasonable possibility that the proposed action would significantly degrade any environmental factor." Pet. App. A8 (emphasis added). This standard was recently reaffirmed in *Fritiofson* v. *Alexander*, 772 F.2d 1225, 1238 n.7 (5th Cir. 1985). If the Fifth Circuit means by this language to require only an abstract showing of a theoretical possibility of harm to the environment, it has unduly diminished the deference to be accorded to the agency determination. For example, the Fifth Circuit's language might preclude deference to a soundly based scientific determination of an agency in a case in which the plaintiffs merely produce some individuals who hold contrary beliefs. Cf. *City of New York* v. *United States Dep't of Transportation*, 715 F.2d at 738.[4]

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[4] A court applying the "arbitrary and capricious" standard of review could similarly restrict the agency's exercise of discretion by concluding that failure to give weight to such views was arbitrary. Thus, our objection to the decision below relates to the suggestion that an agency's evaluation of the likelihood of environmental harm is not to be accorded deference, rather than to its adherence to any particular phraseology to describe the standard of review.

3. Despite these concerns about the decision below, the United States has nevertheless concluded, in light of the uncertainty concerning the current position of the Fifth Circuit and the interlocutory posture of this case, that the issue is not now ripe for review by this Court.[5] If, however, the Fifth Circuit does fail to give due deference to agency FONSI's, that failure could well result in a major burden for federal agencies as they attempt to comply with NEPA, and review by this Court would them become appropriate.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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[5] The court of appeals has simply remanded the case to the district court for reconsideration, under the newly formulated standard, of the agency's decision not to prepare an EIS. If the district court again concludes that no EIS was required, and the court of appeals affirms, the issue will be moot. Otherwise, further litigation of this issue in the courts below will probably clarify the extent to which the Fifth Circuit is applying a more stringent standard to the review of agency actions in this context, thereby facilitating this Court's decision concerning the need for further review.

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